No. 93-445-CFY
Status: GRANTED

Docketed:
September 20, 1993

Title: Lenard Ray Beecham, Petitioner
v.
United States
and
Kirby Lee Jones, Petitioner
v.
United States

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Lewin,Nathan, Stobbs,R. Russell

Counsel for respondent: Solicitor General, Nosanchuk,Mathew S.

12.2 Kirby Lee Jones, Petitioner v. United States, 5-24-93, 92-5820. NOTE: 8-13-93 ext til 9-21-93, C.J., CITED, extension applies to Jones, only.

Entry	Date	Note	Proceedings and Orders
1	Sep 20 1993	G	Petition for writ of certiorari filed.
2	Oct 20 1993		Brief of respondent United States in opposition filed.
3	Oct 25 1993		Reply brief of petitioner filed.
4	Oct 27 1993		DISTRIBUTED. November 12, 1993 (Page 2)
5	Nov 15 1993		Petition GRANTED.
			**********
6	Nov 23 1993	G	Motion of petitioner Kirby Lee Jones for leave to proceed further herein in forma pauperis filed.
7	Nov 29 1993		DISTRIBUTED. December 3, 1993. (Page 17)
8	Dec 6 1993		Motion of petitioner Kirby Lee Jones for leave to proceed further herein in forma pauperis GRANTED.
10	Dec 28 1993		Order extending time to file brief of respondent on the merits until January 5, 1994.
11	Jan 5 1994		Joint appendix filed.
12	Jan 5 1994		Brief of petitioners filed.
13	Feb 2 1994		SET FOR ARGUMENT MONDAY, MARCH 21, 1994. (2ND CASE).
14	Feb 7 1994		CIRCULATED.
15	Feb 7 1994	X	Brief of respondent United States filed.
16	Feb 14 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fourth Circuit (LENARD BEECHAM AND KIRBY JONES)
17	Feb 17 1994		Record filed.
		*	Original proceedings United States District Court for the Eastern District of North Carolina (BEECHAM)
18	Feb 22 1994		Record filed.
		*	Certified proceedings United States District Court for the Northern District of West Virginia.
19	Mar 9 1994	X	Reply brief of petitioners filed.
20	Mar 21 1994		ARGUED.

No. 93-445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LENARD RAY BEECHAM

and

KIRBY LEE JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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69

QUESTION PRESENTED

Whether a person with a federal felony conviction who has had his civil rights restored under state law is deemed a felon for purposes of 18 U.S.C. § 922(g)(1), which makes it a federal offense for a convicted felon to possess a firearm.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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LENARD RAY BEECHAM

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---

Petition for a Writ of Certiorari

OPINIONS BELOW

The decision of the court of appeals in *United States v. Beecham* (App. A, pp. 1a-9a, *infra*) is not reported. The decision of the court of appeals in *United States v. Jones* (App. B, pp.10a-22a, *infra*) is reported at 993 F.2d 1131.

JURISDICTION

The decision of the court of appeals in the *Beecham* case was rendered on June 2, 1993. A timely petition for rehearing and suggestion for rehearing in banc was denied on June 29, 1993 (App. C, p. 23a, *infra*). The decision of the court of appeals in the *Jones* case was rendered on May 24, 1993. On August 13, 1993, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari in the *Jones* case to and including September 21, 1993 (App. D, p. 24a, *infra*). This petition is being filed with respect to both the *Beecham* and *Jones* decisions under Rule 12.2 of the Rules of this Court that provides:

> When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 922(g) of Title 18 provides as follows:

> (g) It shall be unlawful for any person —

> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> (4) who has been adjudicated as a mental defective or has been committed to a mental institution;
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions; or
>
> (7) who, having been a citizen of the United States, has renounced his citizenship;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 921(a)(20) of Title 18 provides as follows:

> (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include —

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses, relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT

Introduction

This petition brings before this Court an issue of federal law that the Court of Appeals for the Fourth Circuit has decided in conflict with the Eighth and Ninth Circuits. The Fourth Circuit decided the issue in two criminal appeals that recently came before it. Pursuant to Rule 12.2 of the Rules of this Court, one issue of law is being presented, on behalf of both petitioners, in a single Petition for a Writ of Certiorari. We set out below the relevant facts of the two criminal cases.

The *Beecham* Case

In January 1979, petitioner Beecham was convicted in the United States District Court for the Western District of Tennessee of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Tennessee law provides for the automatic restoration of rights of certain convicted felons under Tenn. Code Ann. §§ 40-29-105(b)(1)(B) and (C).

In 1990, petitioner was owner and operator of a used car dealership in Raleigh, North Carolina. Between November 1990 and March 1991, petitioner purchased and sold a semi-automatic pistol. He also purchased another pistol and a shotgun, and sold a shotgun to his former partner in the car dealership and a revolver to an employee of the Bureau of Alcohol, Tobacco and Firearms ("ATF") who was posing as a car purchaser. Search warrants executed in petitioner's home and place of business in March 1991 produced other evidence of his ownership of firearms.

Petitioner completed an ATF form when he purchased a shotgun from a licensed dealer in December 1990. In answer to the question whether he had been convicted of a felony, petitioner replied, "No."

Petitioner was charged in an 11-count indictment in the Eastern District of North Carolina with five counts of possessing a firearm following a felony conviction in violation of 18 U.S.C. § 922(g)(1), with five counts of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A), and with one count of making a false statement in connection with the purchase of a firearm in violation of 18 U.S.C. § 922(a)(6). Following a trial by jury, he was convicted on all counts.

After return of the jury's verdict, the trial judge granted petitioner's motion for a judgment of acquittal on the felon-in-possession and false-statement counts on the ground that the effect of Tennessee's restoration-of-rights statute was to extinguish petitioner's prior federal conviction for purposes of the federal firearms statute.

The government appealed from the entry of the judgment of acquittal. The Court of Appeals for the Fourth Circuit reversed on the basis of its decision in *United States v. Jones*.

The *Jones* Case

Petitioner Jones was convicted in the courts of West Virginia in 1969 and in 1978 of breaking and entering and of forgery. He was also convicted in 1971 in the United States District Court for the Southern District of Ohio of interstate transportation of a stolen automobile. In 1982, on being discharged from a West Virginia prison, he received a certificate that declared, pursuant to West Virginia law, that his civil rights were restored.

Petitioner was indicted in the Northern District of West Virginia in March 1992 on a two-count indictment charging him with violations of 18 U.S.C. § 922(g)(1) (felon-in-possession) and § 922 (a)(6) (false-statement). This prosecution was based on petitioner's federal felony conviction in 1971 which, in the government's view, made him a convicted felon in 1992 for purposes of the federal firearms laws. Petitioner moved to dismiss the indictment on the ground that the restoration of rights granted by West Virginia law effectively expunged his federal conviction under 18 U.S.C. § 921(a)(20).

The district court accepted a magistrate judge's recommendation (App. E, pp. 25a-30a, *infra*) that the indictment be dismissed. The magistrate judge relied on decisions of the Eighth and Ninth Circuits that had held that a state's restoration of civil rights to a felon convicted of a federal felony vitiates the federal conviction under 18 U.S.C. § 921(a)(20).

On appeal, the Fourth Circuit reversed. The court acknowledged that the Eighth and Ninth Circuits had squarely held in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991), and *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991), that a state's restoration of civil rights negates a prior federal conviction under 18 U.S.C. § 921(a)(20) and thereby precludes a charge under 18 U.S.C. § 922(g)(1). The court observed that a "circuit-split . . . will be created by our judgment" (p. 14a, *infra*).

The Fourth Circuit disagreed with the Eighth and Ninth Circuits on the "plain meaning" of Section 921(a)(20). The court below held that the term "restoration of civil rights" is subject to several legitimate interpretations, and that the legislative history justifies the conclusion "that Congress intended for a state's post-conviction restoration scheme to affect only the rights of persons convicted in that state's courts" (pp. 21a-22a, *infra*).

REASONS FOR GRANTING THE WRIT

1. **There is now a square inter-circuit conflict.** — The court of appeals recognized in its *Jones* opinion that its decision created a "circuit-split" (p. 14a, *infra*). The Eighth and Ninth Circuits have held in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991), and *United States*

v. Geyler, 932 F.2d 1330 (9th Cir. 1991), that a person who is convicted of a federal felony and thereafter has his civil rights restored by operation of state law is not deemed to be a "person convicted in any court of a crime punishable by imprisonment for a term exceeding one year" for purposes of prosecution under 18 U.S.C. § 922(g).

The Ninth Circuit's *Geyler* decision noted that the governing statute refers specifically to the "restoration of civil rights" as a reason for nullifying a conviction for purposes of the federal firearms statute. Congress must have anticipated, therefore, that this relief, which is *only* available under state law and is not available under federal law, would be a valid basis for disregarding *any* prior conviction of a person who is found to possess or own a firearm. And in view of the broad, all-encompassing language of Section 921(a)(20) — which applies to *any* conviction that satisfies the definition of a "crime punishable by imprisonment for a term exceeding one year" — Congress intended that federal felony convictions, as well as state convictions, would be nullified if the felon had his rights restored under state law. 932 F.2d at 1333.

The Eighth Circuit agreed with the Ninth Circuit in its *Edwards* decision, and also rejected the argument that 18 U.S.C. § 925(c), a provision authorizing special applications to the Secretary of the Treasury for relief from the statutory disabilities, is the exclusive means by which a federal felon may regain the right to possess a firearm. 946 F.2d at 1350.

In its decisions in *Beecham* and *Jones* the Fourth Circuit has disagreed with the rationale and conclusion of both federal appellate courts. Based on its view of the purpose of the federal firearms laws — "to keep guns out of the wrong hands" (p. 20a, *infra*) — the Fourth Circuit has

ignored the plain language of the federal statute and has held that a state's restoration of rights affects only the continued vitality of a felony conviction in its own courts, but not the consequences of the federal conviction under the federal firearms laws. This conflict warrants authoritative resolution by this Court. [1]

2. <u>The conflict creates great uncertainty</u>. — This is not a conflict that affects only court procedures or other issues that have little effect on the primary conduct of ordinary citizens. As a result of the conflicting decisions of the courts of appeals, ordinary citizens who wish to be law-abiding do not know how to conform their conduct to the requirements of the law.

May an individual who was convicted of a federal felony (other than those specifically enumerated in 18 U.S.C. § 920 (a)(20)(A)), and whose civil rights have been restored by state law purchase a firearm? If he lives in Alaska, Arizona, Arkansas, California, Hawaii, Idaho, Iowa, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, or Washington, he may purchase a firearm from a registered dealer on completing the standard registration. If he lives in Maryland, North Carolina, South Carolina, Virginia, or West Virginia, he may not. And if he lives in any of the other 29 States of the Union, he purchases a firearm at his own risk. That geographical distinction was surely not contemplated by Congress.

---

[1] As the magistrate judge noted in his *Jones* decision, the Sixth Circuit expressed its agreement with *Geyler* and *Edwards* in its decision in *United States v. Kaplan*, 972 F.2d 349 (6th Cir. 1992) (unpublished opinion). A copy of the Sixth Circuit's *Kaplan* opinion appears as Appendix F, pp. 31a-52a, *infra*.

Indeed, it is a fair inference from the record that petitioner Beecham believed that the restoration of rights he had received from Tennessee nullified his federal conviction for firearms purposes. His purchase and sale of various firearms was so open that it is not reconcilable with any consciousness that he was committing a federal offense.

Moreover, until this conflict is resolved by an authoritative ruling from this Court, its existence creates uncertainty even for individuals residing in any of the three Circuits where the issue has already been resolved. If a resident of Oregon with a federal felony conviction who lawfully purchases a firearm under the *Geyler* decision carries his weapon across the country to Virginia and is found in that state, may he be successfully prosecuted in a federal court in Richmond? So long as the conflict continues, that possibility exists.

3. **The decision conflicts with the principle of lenity and with the plain language of the statute.** — The Fourth Circuit's decision is also erroneous because it conflicts with the "rule of lenity" that this Court has repeatedly applied in the construction of criminal statutes. In *United States v. Bass*, 404 U.S. 336, 348 (1971), the Court said that "where there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant." *See also Liparota v. United States*, 471 U.S. 419, 427 (1985). Applying this principle in *Crandon v. United States*, 494 U.S. 152, 158 (1990), this Court said that the rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability."

The plain language of the statute relieves the petitioners of criminal liability because their civil rights were restored by operation of local law before the date on which they owned or possessed the firearms. But even if the applicable statute is ambiguous, the "rule of lenity" bars their prosecution or conviction.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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September 1993

APPENDIX

APPENDIX A

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. LENARD RAY BEECHAM, *Defendant-Appellee.*	)	No. 92-5147

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LENARD RAY BEECHAM, *Defendant-Appellant.*	)	No. 92-5399

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge;
Franklin T. Dupree, Jr., Senior District Judge.
(CR-91-84-5)

Argued: March 4, 1993
Decided: June 2, 1993

Before HALL, Circuit Judge,
BUTZNER, Senior Circuit Judge, and
POTTER, United States District Judge for the
Western District of North Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: John Fichter De Pue, Terrorism & Violent Crime Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Thomas Peter McNamara, HAFER, MCNAMARA, CALDWELL & CARRAWAY, P.A., Raleigh, North Carolina, for Appellee. **ON BRIEF:** Margaret Person Currin, United States Attorney, Raleigh, North Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The United States appeals an order granting judgment of acquittal on five counts charging Lenard Ray Beecham with being an ex-felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and one count of making a false

statement in connection with the purchase of a firearm, in violation of 18 U.S.C. § 922(a)(6) (No. 92-5147). Beecham cross-appeals his conviction on five counts of dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A) (No. 92-5399). We reverse the judgment of acquittal, affirm the judgment of conviction, and remand for further proceedings.

I

Beecham was convicted of a felony in 1979 in the federal court for the Western District of Tennessee. After his release from prison, he and Anthony Lucas opened Eagle Auto Sales, a used car dealership, in Raleigh, North Carolina. The focus of the evidence at trial was on firearms sales by Beecham on the premises of the dealership during late 1990 and early 1991.

While working at the dealership in November, 1990, Beecham bought a 9mm. semi-automatic pistol for $375 which he later sold to Lucas for $450. About this same time, he also sold a shotgun to Lucas for $300.

On December 22, 1990, Beecham purchased a .410 gauge shotgun from a licensed firearms dealer. On the required Bureau of Alcohol, Tobacco and Firearms (ATF) form, Beecham answered "no" to the question asking whether he had ever been convicted of a felony in any court.

On February 2, 1991, Clarence Jones, a customer at the dealership, told a salesman that he did not have the full price of a certain automobile on the lot, but that he did have a .44 magnum pistol that he was going to sell soon. The salesman said he knew someone who would be interested in the gun and went to speak with Beecham. When the

salesman returned, he offered to include the gun in the down payment for the car. The car deal was not consummated, but the gun was sold for $350. Although the entire transaction took place between Jones and the salesman, Jones signed a written agreement indicating that Beecham was the purchaser.

A few weeks later, ATF agent McAleer posed as a customer at the car dealership and told a salesman that he was interested in obtaining a .44 caliber revolver. The salesman replied: "I think he's still got a .44 that he still wants to sell." Beecham introduced himself to McAleer and they discussed the revolver. During the discussion, Beecham noted that he did a lot of gun business. McAleer bought the gun for $500.

On March 14, 1991, search warrants were executed at the dealership and at Beecham's home. A .45 caliber semi-automatic pistol was found in a zippered case in an employee's car on the lot, and a search of the office turned up a bill of sale evidencing the purchase of this pistol by Beecham in January, 1991. The search of Beecham's home revealed five firearms, including one that had been purchased by Beecham's wife.

Lucas testified that Beecham often traded guns and that he had seen Beecham involved in "maybe five" transactions in which cash was exchanged. Donnie Barbour, formerly a licensed gun dealer, testified that Beecham had showed him "quite a few" firearms and had asked about their value. Barbour also stated that Beecham said he sold guns for more than they were worth.

Beecham was found guilty by a jury of five counts of being an ex-felon in possession of a firearm, one count of making a false statement in connection with the purchase of

a firearm, and five counts of dealing in firearms without a license. An element of the felon-in-possession and false-statement crimes is that the defendant have a prior felony conviction, and the district court held that the State of Tennessee's restoration of Beecham's civil rights after the completion of his 1979 federal sentence nullified that conviction insofar as these charges were concerned. Accordingly, the district court granted Beecham's motion for judgment of acquittal on the felon-in-possession and false-statement counts, and the government appeals this ruling. Beecham's cross-appeal is grounded on his contention that he was not a "dealer" who was required to obtain a license under the statute of conviction.

II

The issue raised in the government's appeal has been recently decided by this court in *United States v. Jones*, 92-5820 (4th Cir. May 24, 1993). In *Jones*, we held that a state's restoration-of-rights scheme does not nullify a prior federal conviction under the definition of predicate conviction in 18 U.S.C. § 921(a)(20). Beecham's 1979 conviction in federal court remains unaffected by Tennessee's, North Carolina's, or any other state's restoration-of-rights scheme for the purposes of these federal firearms statutes. Accordingly, we reverse the ruling of the district court dismissing the § 922(g)(1) and § 922(a)(6) convictions.

III

In his cross-appeal, Beecham argues that the evidence was insufficient to support his convictions on the five counts of violating § 922 (a)(1)(A) because his firearm-related activities did not rise to the level of a "business." [1]

The statute of conviction, 18 U.S.C. § 922(a)(1)(A), reads in pertinent part:

> (a) It shall be unlawful —
>
> (1) for any person —
>
> (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport or receive any firearm in interstate or foreign commerce. . . .

The definitions section, 18 U.S.C. § 921, provides in pertinent part:

---

[1] Beecham concedes that no issue was raised below regarding the sufficiency of the evidence on the § 922(a)(1)(A) convictions, yet he contends that "the issue . . . was properly before the District Court." Cross-appellant's brief at 14. We have read the portions of the record cited by Beecham in support of this contention and are unable to discover any indication that this argument was raised below. In view of such a waiver, we will normally overturn the judgment of conviction only upon a finding of "manifest injustice." *See United States v. Stevens*, 817 F.2d 254, 255 n.1 (4th Cir. 1987). The government, however has fully briefed the sufficiency issue, and we choose to rest our decision on this basis.

> (a) As used in this chapter —
>
> (11) The term "dealer" means
>
> (A) any person engaged in the business of selling firearms at wholesale or retail,
>
> * * * *
>
> (21) The term "engaged in the business" means —
>
> (C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but shall not include a person who makes occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.
>
> * * * *
>
> (22) The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection . . .

Beecham maintains that his firearms dealings were sporadic at most and that they did not rise to the level of "engaged in the business of selling firearms . . . ." He fails to recognize that a sufficiency of evidence argument must proceed from the standpoint of viewing all the evidence in the light most favorable to the government and of giving the government the benefit of all reasonable inferences. Viewed thusly, the evidence is sufficient.

The government need not prove that a defendant's "primary business was dealing in firearms or that he necessarily made a profit from it." *United States v. Masters*, 622 F.2d 83, 88 (4th Cir. 1980). The government must show "a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist." *United States v. Huffman*, 518 F.2d 80, 81 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975). It is sufficient that the evidence supports an inference that dealing in firearms was a regular business to which the defendant devoted time and effort and from which he intended to obtain a profit. A brief review of the evidence demonstrates that Beecham's firearm-related activity was more than a hobby.

Lucas witnessed the defendant involved in about five cash transactions for guns. Barbour, a formerly licensed gun dealer, had been asked to appraise "quite a few" firearms for Beecham. Beecham himself told agent McAleer that he bought "a lot of guns." A former salesman at the dealership told McAleer that Beecham could get "a lot more guns," and he testified that "a lot of guns moved through [the dealership]." Beecham told Barbour that he always sold the firearms "for more than what they were worth." Notwithstanding Beecham's efforts to minimize the extent of his dealings, the evidence and the allowable inferences therefrom clearly supports the verdict.

IV

In the government's appeal (92-5147), the judgment of the district court is reversed. In Beecham's appeal (92-5399), the judgment of conviction on counts 2, 6, 8, 9 and 10 is affirmed, and the sentence on these counts is vacated in order to allow the district court to determine the proper guideline sentence. The case is remanded with instructions to (1) reinstate the verdict and enter judgment of conviction on counts 1, 3, 4, 5, 7, and 11, and (2) resentence on all counts.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

Kirby Lee JONES, Defendant-Appellee.

No. 92-5820.

United States Court of Appeals,
Fourth Circuit.

Argued April 2, 1993.

Decided May 24, 1993.

Amended by Order Filed July 9, 1993.

Indictment charging defendant with being felon in possession of a firearm and making false statements in connection with purchase of firearm was dismissed by the United States District Court for the Northern District of West Virginia, Robert Earl Maxwell, Chief Judge, and government appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that state's postconviction restoration of rights scheme cannot eliminate prior federal conviction as prior conviction for federal offense as being a felon in possession of a firearm.

Reversed and remanded with directions.

David J. Horne, Sr. Atty., Office of the Asst. Chief Counsel, Bureau of Alcohol, Tobacco & Firearms, Cincinnati, OH, argued (William A. Kolibash, U.S. Atty., and Lisa A. Grimes, Asst. U.S. Atty., Wheeling, WV, on brief), for appellant.

R. Russell Stobbs, Weston, WV, argued for appellee.

Before HALL and LUTTIG, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

K.K. HALL, Circuit Judge:

The United States appeals an order dismissing an indictment against Kirby Lee Jones. The indictment charged Jones with two counts of violating federal firearms laws. We reverse.

I

On March 3, 1992, Jones was indicted in the Northern District of West Virginia on one count of being an ex-felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and one count of making a false statement in connection with the purchase of a firearm, in violation of 18 U.S.C. § 922 (a)(6) and 924 (a)(1)(B). The indictment alleged that Jones had previously been convicted of the following felonies: (1) breaking and entering in 1969; (2) interstate transportation of a stolen motor vehicle in 1971; and (3) forgery in 1978. The stolen car conviction occurred in the United States District Court for the Southern District

of Ohio. The other convictions were in the state courts of West Virginia.

The government concedes that the state convictions cannot serve as predicate felonies under 18 U.S.C. § 921(a)(20) because West Virginia restored Jones' civil rights upon the completion of the forgery sentence in 1982. *See United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992). The government contended, however, that the federal conviction remained a viable predicate conviction under the federal firearms act. The magistrate judge [1] recommended adoption of the position of the Eighth and Ninth Circuits that a state's restoration of rights scheme has the effect of eliminating even a prior federal conviction as a predicate conviction under § 922(g)(1). [2] The district court adopted the recommendation and dismissed the indictment. The government appeals.

II

It is a federal offense for some ex-felons to possess firearms: "It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . .

---

[1] The defendant's motion to dismiss the indictment was referred to the magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed.R.Civ.P. 72(b).

[2] Count 2 of the indictment alleged that Jones falsely stated on the ATF forms that he was not prohibited by the federal firearms laws from possessing a firearm. The magistrate judge discussed only the felon-in-possession count (§ 922(g)(1)), apparently on the assumption that the allegedly false statement was not false if Jones was not prohibited from possessing a firearm under § 922(g)(1). On appeal, the government does not argue that count 2 could stand alone.

possess in or affecting commerce, any firearm . . . ." 18 U.S.C. § 922(g)(1). What qualifies as a "crime punishable by imprisonment for a term exceeding one year," or "predicate conviction," however, is subject to a number of statutory exceptions. Two of these exceptions have existed since 1968: (1) any prior conviction based on a violation of laws regulating business practices (18 U.S.C. § 921(a)(20)(A)); and (2) any prior state conviction for an offense that is classified as a misdemeanor by the state (18 U.S.C. § 921(a)(20)(B)). [3] These relatively straightforward provisions have generated little caselaw. *See, e.g., United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1597, 80 L.Ed.2d 128 (1984) (holding that a prior conviction for falsifying a customs declaration is not an offense relating to business practices within the meaning of § 921(a)(20)(B)).

In 1986, the Firearm Owners' Protection Act [4] refined the definition of predicate conviction as follows:

> What constitutes a conviction of [a crime punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or

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[3] Gun Control Act of 1968, Pub.L. 90-618, Title I, § 102, 82 Stat. 1214.

[4] Pub.L. 99-308, § 101(5), 100 Stat. 449.

> restoration of civil rights expressly provides that the person may not ship, possess, or receive firearms.

This final provision of § 921(a)(20) [hereinafter, the "amendment"], particularly the term "has had civil rights restored," has engendered a growing body of caselaw. This amendment is the focus of this case.

We have dealt with this amendment on a number of occasions, but always from the perspective of a predicate *state* conviction. *See, e.g., United States v. McLean* 904 F.2d 216 (4th Cir.), *cert. denied*, 498 U.S. 875, 111 S.Ct. 203, 112 L.Ed.2d 164 (1990). The purported predicate conviction in Jones' case, however is a 1979 conviction in the *federal* district court of Ohio. The Eighth and Ninth Circuits have recently held that a state's restoration of rights scheme can negate even a prior *federal* conviction for the purposes of 18 U.S.C. § 922(g)(1) and § 921(a)(20). *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991); *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991). Our interpretation of the statute leads us to the opposite conclusion.

III

In view of the circuit-split that will be created by our judgment, perhaps our first task should be to explain why we reject the analyses and holdings of our sister circuits. For clarity's sake, inasmuch as both *Geyler* and *Edwards* come to the same conclusion by the same route, we will limit our discussion to the earlier-decided and more extensive opinion of the Ninth Circuit.

The linchpin of *Geyler* [5] (although it is not acknowledged as such) is that the second sentence of the amendment should be considered apart from the first -- "[t]he two sentences . . . pertain to two entirely different sets of circumstances." *Geyler*, 932 F.2d at 1334-35. In support of this segregation, the court characterizes the first sentence as merely setting forth the seemingly unremarkable proposition that "federal law determines the existence of a federal conviction, and state law determines the existence of a state conviction." *Id.* at 1334. Contrary to the "wishful suggestion" of the government, the court described the second sentence as an "unrelated reference" to the effect of post-conviction events. *Id.* at 1334-35. [6]

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[5] At its most fundamental level *Geyler* rests on the interpretation of Arizona law. The court stated that "upon [Geyler's] discharge from imprisonment [on the federal sentence], . . . Arizona granted him an automatic restoration of civil rights." *Geyler*, 932 F.2d at 1331 and n. 1. This statement is based on an Arizona restoration-of-rights statute that does not mention federal convictions, but which the court interprets to include federal convictions in order to avoid an anomalous result.

In Jones' case, the district court held, based on our decision in *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992), that West Virginia law, as evidenced by the 'certificate of discharge' received by Jones, restored his civil rights. Jones, of course, received nothing from the State of West Virginia upon completion of his federal sentence. Instead of examining West Virginia law to determine whether the state's restoration scheme was intended to cover federal felons, we choose to rest our decision on the federal statute alone.

[6] After noting that the first sentence "quite simply" says that the prosecuting jurisdiction determines what a conviction is (952 F.2d at 1335), the court added the following footnote:

> The [first] sentence was enacted "to accommodate state reforms adopted since 1969, which permit dismissal of charges after a plea and successful completion of a probationary period, or

Having reduced the scope of its inquiry to a single sentence, the court purports to find that the term at issue — "any conviction . . . for which a person . . . has had civil rights restored . . . ." — is decipherable through examination of the plain meaning of the words alone. The analysis proceeds along the following lines: (1) although both the states and the federal government provide for pardons, expungements and setting aside convictions, only states provide procedures for restoring civil rights to persons who have completed felony sentences; (2) "Congress could not have expected that the federal government would perform this [restoration] function . . . ."; (3) Congress could have limited the benefits of rights restoration to state felons only; (4) the second sentence refers to "any conviction;" (5) therefore, the reference to the restoration of civil rights must be to the state procedure.

This analysis does not strike us as one based solely on plain meaning. The first departure from a plain meaning analysis is the court's assumption that the Congress "was certainly aware" of the lack of a federal restoration procedure. "Restoration of civil rights" is, at the very least, a term that can admit of several legitimate interpretations. It is, for example, at least arguable that the federal procedure embodied in 18 U.S.C. § 925(c) is a rights-restoration scheme; indeed, it is the ultimate restoration for firearm

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which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. *Federal Firearms Owners Protection Act*, S.Rep. No. 583, 98th Cong., 2d sess. 7 (1984).

Id. at n. 7. This is hardly support for the proposition that the two sentences are unrelated. The cited material refers directly to the post-conviction procedures outlined in the second sentence of the amendment.

purposes. [7] Another possibility is that the term applies only to situations in which "some state *action* granted a convicted felon a specific pardon, expungement or restoration of rights, such as a Restoration of Civil Rights Certificate . . ." *(United States v. Hammonds*, 786 F.Supp. 650, 662 (E.D.Mich. 1992) (emphasis in original)), rather than restorations by operation of law. *See also United States v. Ramos*, 961 F.2d 1003, 1008 (1st Cir. 1992) (interpreting restoration of rights to require "some affirmative step after conviction."). In any event, as soon as the court in *Geyler* strayed outside the text of the statute to assume congressional knowledge on a subject that is outside the ken of most persons, the plain meaning analysis was compromised.

In a footnote, the *Geyler* court concedes that there are *some* civil rights lost by virtue of a federal felony conviction that "presumably the state cannot restore." *Id.* at 1334 n. 6. What the court does not say is that these civil rights could presumably be restored by the federal government; that the federal government did not have in place a restoration procedure in 1986 does not preclude the possibility that one would be established sometime thereafter.

The upshot of all this is that the Ninth Circuit's "plain language" interpretation of the amendment misses the forest for the trees. "[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) (internal citation omitted) (quoted in *Geyler*, 932 F.2d at 1337 (Fletcher, J.

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[7] This section establishes a procedure by which the Secretary of the Treasury may provide "relief from the disabilities imposed by federal laws with respect to the . . . possession of firearms . . . ."

dissenting)). Once it is determined that the words of the amendment itself do not readily admit of a single interpretation, we must place it in some larger context.

IV

"Statutes, including penal enactments are not inert exercises in literary composition. They are instruments of government, and in construing them the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Shirey*, 359 U.S. 255, 260-61, 79 S.Ct. 746, 749, 3 L.Ed.2d 789 (1959) (internal quotation omitted). Subsection 921(a)(20) has a single purpose — to define a term used elsewhere in the Act, *i.e.* "a crime punishable by imprisonment for a term exceeding one year." As a definitional provision, the amendment has meaning only in reference to the overall act in which the definition is used.

The Gun Control Act of 1968 [8] was a response "to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate." H.Rep. No. 1577 (June 21, 1968). As a general proposition, then, the legislative goal was to exert greater federal control over the spread of firearms. One of the means of accomplishing this was to prohibit ex-felons from possessing or dealing in firearms. Initially, all former felons were to be covered by the prohibition except those covered by subsections (a)(20)(A) and (B).

The primary impetus for the amendment under discussion was Congress's intent to reverse the ruling of the

[8] The Gun Control Act was enacted as Title IV of the Omnibus Crime Control and Safe Street Act of 1968.

Supreme Court in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983). *See United States v. Geyler*, 932 F.2d 1330, 1335 (9th Cir. 1991); *id.* at 1336-37 (Fletcher, J. dissenting). *Dickerson* involved a prior state prosecution of one Kennison for carrying a concealed firearm. State law allowed the court to place Kennison on probation while deferring entry of judgment of conviction. Upon Kennison's successful completion of the probationary period, the record of the deferred judgment was expunged. Kennison later applied for a firearm dealer's license from the Bureau of Alcohol, Tobacco and Firearms. On the license application, he answered that he had never been convicted of a felony. The license was issued but later revoked on the ground that the state conviction triggered the federal firearm disabilities. [9] The Supreme Court upheld the revocation. In reaching this result, the Court held that the issue of what constituted a "conviction" under the federal firearms statutes was a question of federal, not state, law. *Id.* at 111-12, 103 S.Ct. at 991.

In the Senate report accompanying a bill containing essentially the same provisions as the current version of § 921(a)(20), [10] the committee noted that "[s]ince the Federal prohibition is keyed to the state's conviction, state law should govern in these matters." S.R. 98-583 (98th

[9] In addition to prohibiting ex-felons from possessing firearms, § 922(g) and (h) prohibit the same class of ex-felons from dealing in firearms without a license from the Secretary of the Treasury. *See* 18 U.S.C. § 923(d)(1)(b) (1982).

[10] S.Rept. No. 98-583 (98th Congress) accompanied S. 914, which contained substantially the same language regarding the exclusion from the definition of conviction now found in § 921(a)(20).

Congress). The report also noted that the bill would override the *Dickerson* decision where state courts or legislatures had decided not to treat certain guilty pleas as convictions. *Id.* at n. 16. In other words, a state would determine the lingering effects of a conviction in its own courts. The purpose of the statute remains unchanged — to keep guns out of the wrong hands.

Given this background, it is difficult to imagine any conclusion other than the one we reach in this case. By enacting the amendment, Congress clearly wished to endow each state with the power to determine how convictions by that state would be treated. If a state determines that one of *its* offenders should not be stigmatized in any manner, then the amendment allows the state to return such an offender to his pre-conviction status. But "a preference exists for determining the meaning of federal criminal legislation without reliance on diverse state laws [and] . . . in the absence of a specific indication to incorporate the differing rules of the states, federal criminal sanctions should be applied with uniform standards and definitions." *United States v. Lender*, 985 F.2d 151, 157 (4th Cir. 1993) (interpreting the first sentence of the amendment). *See also NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965) ("In the absence of a plain indication to the contrary, . . . it will be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."). We believe that a far greater degree of specificity would be necessary before we would be willing to find a statutory intent to allow the individual states to negate federal convictions.

V

Under the holdings in *Geyler* and *Edwards*, the confusion engendered by the federal statute would increase exponentially. The possibility of a "civil rights bath" is alluded to in *Edwards*. *See* 946 F.2d at 1350. One only has to pursue this concept a short distance before the problems become evident. For example, A and B are released from federal prison after serving sentences for identical crimes. Each was prosecuted in the same district court in a state that does not restore civil rights to its own felons. A remains in the state in which he was prosecuted. After a while, he goes to visit B, who was then living in a state that does restore civil rights. Together they commit an armed robbery in B's new home state and are prosecuted in the federal court there for, among other offenses, violations of § 922(g)(1). Under *Geyler*'s holding, B could not be prosecuted for the firearm offense, whereas A could. A similar result would arguably obtain if B had only temporarily moved to the restoring state (long enough to get his "bath") and then committed the robbery in A's state. Such possibilities militate further against the interpretation adopted in *Geyler*.

VI

As an alternative basis for its holding, the court in *Geyler* asserts that the rule of lenity requires the result reached in that case because the reference in the second sentence to "any conviction" renders the amendment ambiguous "at the least." *Id.* at 1336; *see also Edwards*, 946 F.2d at 1350. The rule of lenity applies only where the ambiguity remains after resort to the legislative history fails to disclose the intent of the drafters. *See United States v. McDonald*, 692 F.2d 376, 379 (5th Cir. 1982), *cert. denied*, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). As

discussed above, we find no ambiguity. The legislative history leads to only one conclusion — that Congress intended for a state's post-conviction restoration scheme to affect only the rights of persons convicted in that state's courts.

The order dismissing the indictment is reversed, and the case is remanded with directions to reinstate the indictment.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 29, 1993

No. 92-5147
CR-91-84-5

UNITED STATES OF AMERICA
Plaintiff - Appellant

v.

LENARD RAY BEECHAM
Defendant - Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
Clerk

APPENDIX D

Supreme Court of the United States

No. A-141

Kirby Lee Jones,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 21, 1993.

/s/ William R. Rehnquist
Chief Justice of the United States

Dated this 13th
day of August, 1993

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v.

KIRBY LEE JONES,
Defendant.

CRIMINAL ACTION
NO. 92-00046
FILED OCT. 21, 1992
U.S. DISTRICT COURT
ELKINS, WV 26241

PROPOSED FINDINGS OF FACT
AND RECOMMENDATION FOR DISPOSITION

The defendant in this criminal action has filed a Motion to Dismiss Indictment. The Honorable Robert E. Maxwell, United States Chief District Judge, referred this dispositive motion to the undersigned United States Magistrate Judge for a recommendation for disposition. 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b); Local Court Rule 4.01(d). For the reasons expressed below, I recommend that the defendant's motion be granted.

The defendant is charged in a two count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), and with knowingly making a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6). The Indictment relies upon three felony convictions: a 1969 West Virginia conviction for Breaking and Entering, a 1971 federal conviction for Interstate Transportation of a Stolen

Automobile, and a 1978 West Virginia conviction for Forgery.

The defendant argues that the Indictment should be dismissed because none of these convictions constitute a conviction within the meaning of 18 U.S.C. § 921(a)(20). That section provides:

> What constitutes a conviction for such a crime shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In this case, on May 21, 1982, the defendant received a document from the West Virginia Department of Corrections, entitled Official Certificate of Discharge, which certifies that Jones, "is hereby discharged from parole and any or all civil rights heretofore forfeited are restored."

In *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992), the Fourth Circuit held that such a restoration precludes prosecution under 18 U.S.C. § 922(g)(1) because it does not expressly limit the right of the felon to possess a firearm as required by § 921(a)(20). Further, the court held that such a prosecution is barred for felons receiving a certificate before July 7, 1991, even though on that date

W.Va. Code § 61-7-7 criminalized possession of a firearm by a former felon.

In this case, therefore, "the Government concedes that based on *Haynes*, the two West Virginia convictions" cannot form the basis for a § 922(g)(1) prosecution. The Government argues, however, that the *state* Certificate of Discharge does not affect the validity of the defendant's 1971 *federal* conviction.

The two circuits which have addressed the issue directly reject the Government's position. [1] In *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991), the defendant was convicted of a federal felony. As a result, his civil rights in his home state of Arizona were revoked. Upon discharge from imprisonment, Arizona law granted him an automatic restoration of his civil rights.

The Ninth Circuit held that such restoration precluded use of the federal felony. The court acknowledged that an expungement, pardon or setting aside of a conviction nullifies the conviction itself and may only be performed by the jurisdiction of conviction. It held, however, that restoration of civil rights is not so restricted. In support of this conclusion, the court reasoned first that Congress could not have expected the federal government to perform this function, because "there is no federal procedure for restoring federal rights to a federal felon." *Id.* at 1333. Further, "the overwhelming majority of civil disabilities imposed upon the conviction of a felony whether the conviction is state or

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[1] The Sixth Circuit would apparently follow the Eighth and Ninth Circuits. In an unpublished opinion, *United States v. Kaplan*, 972 F.2d 349 (6th Cir. 1992), the court expressly reserved the issue but favorably discussed *Edwards* and *Geyler* at considerable length.

federal are imposed by state law. *Id.* at 1334 n.6. Thus, the Arizona restoration prevented use of the defendant's federal conviction.

The Eighth Circuit reached the same result in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991). The defendant in that case also had a prior federal felony conviction and his home state of Minnesota statutorily restored his civil rights automatically upon completion of his sentence. The court held that the plain language of the second sentence of § 921(a)(20) "any conviction" is not limited by the first sentence. Although the court held that the statute was unambiguous and therefore resort to legislative history was unnecessary, it noted:

> [The legislative history] shows that the last two sentences of § 921(a)(20) articulate two ideas, addressing two different problems . . . [T]he first sentence in question has to do with the effect of state convictions and the later sentence has to do with the effect of state pardons, restorations of civil rights and expunctions.

Id. at 1349 (citing S.Rep. No. 583, 98th Cong., 2d Sess. 7 (1984) and S.Rep. No. 953 at 7).

In short, "it is the state, not the federal government, that defines and restores a person's civil rights, even in relationship to the federal government." *Id.* at 1350 n. 5 (*quoting* the decision below in *United States v. Edwards*, 745 F.Supp. 1477, 1479 (D.Minn. 1990)).

The Eighth Circuit also rejected the argument that the Government makes here; that 18 U.S.C. § 925(c) is the sole

means by which a federal felon can regain the right to possess a firearm:

> [O]n its face the federal firearms statute sets out two different routes to restoration of firearms privileges. The government has shown no reason why §§ 921(a)(20) and 925 cannot both exist as alternative routes for lifting firearms disabilities.

Id. at 1350.

Especially in the absence of any comparable authority, I am persuaded that *Geyler* and *Edwards* were correctly decided. To the extent that one sentence in *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991) would suggest a contrary result, it is dictum. Accordingly, I recommend that the defendant's motion be granted, and the Indictment in this case be dismissed.

Any party may, within ten (10) days after being served with a copy of this Recommendation for Disposition, file with the Clerk of the Court written objections identifying the portions of the Proposed Findings of Fact and Recommendation for Disposition to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States Chief District Judge. Failure to timely file objections to the Proposed Findings of Fact and Recommendation for Disposition set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such proposed findings and recommendation. 28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467

U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of the Court is directed to mail an authenticated copy of these Proposed Findings of Fact and Recommendation for Disposition to counsel of record.

Respectfully submitted this 21st day of October, 1992.

/s/ United States Magistrate Judge

APPENDIX F

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOWARD JAY KAPLAN, Defendant-Appellant.

No. 91-2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1992 U.S. App. LEXIS 17378

July 17, 1992, Filed

NOTICE:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 972 F.2d 349, 1992 U.S. App. LEXIS 26146.

PRIOR HISTORY: United States District Court for the Eastern District of Michigan. District No. 90-80843. Taylar, District Judge.

JUDGES: BEFORE: GUY and BOGGS, Circuit Judges; and RONEY, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

OPINION BY: PER CURIAM

OPINION: PER CURIAM. Howard Kaplan appeals his convictions for being a felon in possession of a firearm and for making false statements in connection with the acquisition of firearms. He also appeals the district court's sentencing decision. For the reasons given below, we affirm both of Kaplan's convictions. However, we reverse the district court's sentencing decision and remand this case for a recalculation of Kaplan's sentence.

I

On March 1, 1991, Kaplan waived his right to be charged by grand jury indictment. On the same day, the government filed a two-count information, charging Kaplan with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (Count I), and with making a false statement in connection with firearm acquisitions, in violation of 18 U.S.C. § 922(a)(6) (Count II). Kaplan entered a plea of guilty to both counts on March 20, 1991.

Prior to sentencing, Kaplan filed objections to the proposed calculation of his sentence under the guidelines. Specifically, Kaplan objected to the probation department's legal conclusion that the special offense characteristic reduction for possession of firearms for collection and sporting purposes, as authorized by U.S.S.G. § 2K2.1(b)(1), could never apply to a defendant convicted of being a felon in possession of a firearm. Kaplan contended that he was entitled to a sentence reduction because he possessed firearms

as a collector and for the purposes of competitive sport shooting. On August 26, 1991, the United States District Court sentenced Kaplan to 27 months' imprisonment on each count, to run concurrently. The court also imposed a three-year term of supervised release and a $3,000 fine. The court refused to apply the sport/collection adjustment, stating that to find the adjustment applicable to a conviction under the felon in possession statute would "set the law on its ear." Additionally, the court found that target shooting at a gun range as practice for competitive matches did not qualify as a "lawful sporting purpose" and that Kaplan had not possessed the weapons solely for collection purposes.

This conviction arose from the investigation of a burglary at Kaplan's home. After he found that his house had been burglarized, Kaplan notified police. When police arrived, they noted that Kaplan had numerous firearms displayed on the wall of a small, locked room in his home. The local authorities notified the Bureau of Alcohol, Tobacco, and Firearms (ATF). The ATF investigation revealed that Kaplan had prior felony convictions, the most recent of which had occurred in 1981. Using this information, the ATF obtained a warrant and searched Kaplan's home on May 10, 1990. During the search, the government photographed Kaplan's collection of weapons and memorabilia and seized numerous firearms from the secured room in his house. Those eighteen firearms, and the statements Kaplan made to acquire some of them, provided the basis for the information in this case.

The underlying conviction that served as the basis for the felon-in-possession charge in the information was another felon-in-possession conviction that occurred in federal court in Arizona in 1981. Thus, the predicate felony conviction here was another federal crime. Kaplan maintains that

because his civil rights had been restored, the information charging him with being a felon in possession of a firearm in this case failed to allege a chargeable offense and, therefore, his conviction on Count I must be reversed. Kaplan also contends that since his civil rights had been restored and he had the right to possess firearms, Count II of the information, charging him with making false statements in the acquisition of firearms, also failed to allege a federal crime. He therefore urges this court to reverse his conviction on Count II. Finally, Kaplan challenges the district court's sentencing decision. Kaplan argues that the district court erred when it refused to apply the sport/collection adjustment to a felon-in-possession conviction and, further, when it refused to classify Kaplan's guns as part of collection and used exclusively for sporting purposes. We address each of these issues in turn.

II

The Felon-in-Possession Conviction

The main issue in this case centers on the felon-in-possession statute, 18 U.S.C. § 922(g). Section 922(g) provides, in pertinent part:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.

The definition of a conviction for a "crime punishable by imprisonment for a term exceeding one year" is found at 18 U.S.C. § 921(a)(20):

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which had been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

So, if a defendant's civil rights have been restored, and his ability to possess firearms has not been expressly curtailed, then the felony may not be used as the predicate for a federal felon in possession charge.

This Circuit has recently been presented with issues under the felon-in-possession statute in *United States v. Driscoll*, No. 91-1583 (6th Cir. July 16, 1992) and *United States v. Gilliam*, 778 F.Supp. 935 (E.D. Mich. 1991), appeal argued, March 23, 1992 (No. 91-2417). Both of those cases, however, involved state convictions as predicate acts for the felon-in-possession charges. The issue in both Driscoll and Gilliam was whether the state of Michigan had sufficiently restored the civil rights of the defendants such that their respective Michigan convictions could not serve as predicates for the federal felon-in-possession charges in a federal court in Michigan.

The issue in this case is different because the predicate act for the felon-in-possession conviction was a federal felon-in-possession conviction in a different state from the one in which the defendant was arrested. Since we are dealing with a conviction of a federal crime instead of a crime in certain state, the analysis of whether the defendant's civil rights have been restored becomes more complicated. We must determine where to look to answer the pivotal restoration of rights question. First, we must determine whether we should look to federal law or to the law of a particular state. Second, if we should look to state law, then the question becomes which state's law we should apply.

Kaplan's main argument is that the civil rights that he lost as a result of his 1981 conviction on felon in possession charges in a federal court in Arizona had since been restored by Michigan, his state of citizenship. He contends that since his civil rights had been restored for this conviction, then, according to 18 U.S.C. § 921(a)(20), the 1981 conviction could not serve as a predicate for the felon-in-possession charges in this case. Kaplan acknowledges that he can only prevail if state rather than federal law governs the restoration of rights issue, and, further, only if the law of his current state of citizenship, Michigan, rather than the law of the state where he was convicted of the predicate offense, Arizona, applies. Finally, the court must also find that Michigan law, if it applies, actually restored Kaplan's civil rights and did not restrict his right to own firearms. In sum, the only way we can overturn Kaplan's felon-in-possession conviction is if we find that Michigan law applies and restores Kaplan's civil rights without restricting his right to own firearms.

A. The Felon-in-Possession Statute

Until 1986, federal law proscribed the possession, shipment, transportation, and receipt of all firearms or ammunition by anyone who had been convicted "in any court" of a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. §§ 922(g)(1) & (h)(1) (1982) (emphasis added). In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-20 (1983), the Supreme Court held that states had no power to exempt their citizens from the federal firearm ban by restoring the civil rights of felons or expunging their convictions. Congress responded to Dickerson by enacting the Firearm Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), which modified federal firearms law effective November 15, 1986. The Firearm Owners Protection Act changed the law by empowering each state to exempt some or all of its convicted felons from the federal firearm ban.

This court has interpreted § 921(a)(20), the statutory language at issue in this case, on several occasions. Under § 921(a)(20), Congress empowered a state to shield its felons from future conviction for "felon in possession." According to § 921(a)(20):

> What constitutes a conviction for such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which had been expunged, or set aside or for which a person has been pardoned or had his civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. (Emphasis added).

In this case, as in most, we are not dealing with a predicate conviction that has been pardoned, expunged, or set aside. We must, therefore, engage in a two-step analysis. First, we must determine if Kaplan has had his civil rights restored with regard to the predicate conviction. If his civil rights have been restored, then his conviction cannot serve as the predicate for a felon-in-possession charge unless the state expressly restricted his right to possess firearms.

Our jurisprudence sets up a test for determining if a defendant's civil rights have been restored. State weapons restrictions on felons are not a factor in the first step of the civil rights restoration analysis. However, under the second step, such restrictions can nullify the effect of the civil rights restoration and restore the federal government's ability to use the particular offense as a predicate for a felon-in-possession prosecution. In other words, the purpose of the amendment of the federal felon-in-possession statute was to return to the states the decision of whether or not to allow their felons to carry weapons. If the state restores civil rights, and does not restrict weapons possession, then that state's felons will not be subject to prosecution under the federal felon-in-possession statute.

The main Sixth Circuit cases interpreting § 921(a)(20) are *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990) and *United States v. Breckenridge*, 899 F.2d 540 (6th Cir. 1990). In *Cassidy*, 899 F.2d at 546, this court held:

> Considering the definition as a whole, it is clear that Congress intended the courts to refer to state law to determine whether an individual should be subject to federal firearms disabilities by virtue of a criminal conviction. If state law has restored civil rights to a felon, without expressly limiting the felon's firearms

> privileges, the felon is not subject to federal firearms disabilities. This is the clear and unambiguous intent of Congress as expressed in section 921(a)(20).

So, a court must look at the whole of the law in the jurisdiction where the proceeding took place to determine whether the conviction falls within the statutory definition necessary to serve as a predicate conviction for a felon-in-possession charge. We have also held that in determining whether a state has restored the civil rights of a felon, we must look to the whole of state law to see if the state has restored the right to vote, to serve on a jury, and to hold public office. *Id.* at 549. If these rights have been restored, then the state has "restored civil rights" for purposes of § 921(a)(20). If civil rights have been restored in this way, then courts must look to the whole of state law to determine if the state entitles felons "to exercise the privileges of shipping, transporting, possessing or receiving a firearm." *Ibid.*

B. A Federal Felony as the Predicate for a Federal Felon in Possession Conviction

As stated, this case is unique because it involves a federal crime as the predicate offense for Kaplan's conviction. This presents two questions. First, do we now apply state law or federal law to determine if the Kaplan's civil rights have been restored? Second, if state law applies, then which state's law? There have been no Sixth Circuit cases directly on point. Two other circuits, however, have addressed the first question.

A panel of the Ninth Circuit, including Judge Lively of this Circuit sitting by designation, partially addressed this issue in *United States v. Geyler*, 932 F.2d 1330 (9th Cir.

1991). In *Geyler*, the defendant was convicted in federal court in Arizona of the federal felony of misprison of a felony. Geyler received an absolute discharge from imprisonment after serving his sentence and Arizona law granted him an automatic restoration of civil rights. Geyler was later caught holding firearms at his house in Arizona and was convicted by a federal court in Arizona of a violation of the federal felon-in-possession law. The Ninth Circuit held that the inquiry as to whether Geyler's civil rights had been restored was governed by state law, even when the predicate felony was a federal crime.

In *Geyler*, the government relied on the first sentence of § 921(a)(20), which refers to the law of the prosecuting jurisdiction, and argued that only action taken by the federal government, and not by the states, could nullify the effect of a prior federal felony conviction. The Ninth Circuit rejected this contention. The court began by noting that under § 921(a)(20), a conviction cannot serve as a predicate offense if [it] has been expunged or set aside or pardoned or if civil rights have been restored. When a conviction is nullified, set aside, or pardoned, the conviction itself is nullified. However, when civil rights are restored, the sole objective is to restore rights and the conviction itself is not affected. According to the *Geyler* court, 932F.2d at 1332:

> The specific reference in § 921(a)(20) to the restoration procedure indicates that Congress intended to recognize that independent process as a separate basis for treating a conviction as a non-conviction. Moreover, the inclusion in the statute of the restoration procedure could not have been accidental. The procedure is widely used, and Congress was certainly aware of it.

The court then pointed out that both state and federal law contain procedures for the first three procedures set out in the statute: expungement, setting aside of a conviction, and pardon. However, the court found no established federal procedure for the restoration of civil rights. The court held as follows:

> The restoration of civil rights, however, is an entirely different matter. State law deprives felons, both state and federal, of their civil rights initially . . . . And only the states provide a procedure whereby following completion of a felon's sentence his conviction remains intact but his civil rights may be restored. Unlike any of the other procedures listed in § 921(a)(20), a state's restoration of civil rights is available to all felons.
>
> Because there is no federal procedure for restoring civil rights to a federal felon, Congress could not have expected that the federal government would perform this function. The reference in § 921(a)(20) to the restoration of civil rights must be to the state procedure.

Id. at 1333. The court also held that if Congress had meant to limit the benefits of a state's restoration of rights to state felons only, then it would have expressly done so in the statutory language. Instead, § 921(a)(20) provides that "any conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction for purposes of this chapter." So, the court held that according to the plain language of the statute, "a federal felon whose civil rights are restored pursuant to state law, like a state's felon whose rights are so restored, is no longer considered as having been 'convicted' for purposes of the federal firearms laws" *Id.*

The court's discussion of the government's argument, based on the first sentence of the definitional provision of § 921(a)(20), informs the next issue, the choice of which state's law applies. As stated above, in *Geyler* the government argued under the first sentence that what constitutes a conviction for purposes of the felon-in-possession statute "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." The government contended that this also applied to the next sentence and, therefore, civil rights lost through federal crimes could only be restored by the federal government. In rejecting this contention, the court held that the second sentence was separate from the first because it deals with an entirely different set of circumstances:

> The two sentences relied on by the government pertain to two entirely different sets of circumstances. The first sentence addresses the question of what constitutes a conviction; this is, quite simply, answered by the law of the prosecuting jurisdiction, and Congress made it plain that it desired that result. The second sentence governs the effect of post-conviction events. Under the provisions of the second sentence, once the law of the prosecuting jurisdiction has confirmed that a conviction exists, there are four ways in which the effects of the conviction may be avoided for purposes of the federal firearms laws . . . As we have explained, the jurisdictional reach of federal and state law is not the same with respect to each of these procedures. Specifically, the restoration of rights, unlike the other procedures, is carried out only by the states, and it is the only procedure under which one jurisdiction may grant relief to persons convicted in the other.

Id. at 1335. This statement has implications for our choice-of-law principle. If we apply state law, the next question we face is whether to apply the law of the state where the conviction occurred or the state of the defendant's citizenship. The first sentence of the definitional section of § 921(a)(20) would seemingly support applying the law of the state of conviction. However, Geyler suggests otherwise.

The Eighth Circuit, in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991), agreed with the *Geyler* court. More importantly, perhaps, the *Edwards* court adopted the same characterization of the independence of the two sentences in § 921(a)(20). In *Edwards*, 946 F.2d at 1350, the court also stated:

> The government argues that a ruling in Edward's favor would permit felons from around the nation to regain their firearms privileges by going to Minnesota long enough to take a "civil rights bath." If this is so, it is Congress and the Minnesota legislature, not this court, that have drawn the water.

This again suggests that the state of citizenship, and not the state where the convicting federal court was located, provides the relevant state law for the restoration of civil rights determination. In fact, the district court in *Edwards* expressly stated that court should apply the law of the state where the felon is a citizen, and this language was quoted by the Ninth Circuit in *Geyler*:

> While the law of the jurisdiction where the proceeding is held determines what is a conviction and whether it has been set aside, expunged, or subject to a pardon, the law of the state where a person is a citizen governs that person's civil rights.

Geyler, 932 F.2d at 1334 (quoting *United States v. Edwards*, 745 F.Supp. 1477, 1479 (D. Minn. 1990)).

C. Choice of Law

In its brief in this case, the government does not concede that state and not federal law applies in the restoration of rights determination. The government, however, does not really argue the point, but merely contends that application of the appropriate state law in this case will not alter the outcome. The government contends that since Kaplan was convicted of the predicate felony in federal court in Arizona, Arizona law governs the restoration decision. In Arizona, the civil rights of anyone who is convicted of a felony are automatically suspended. However, those rights are restored for first-time offenders "upon completion of the term of probation, or upon absolute discharge from imprisonment." Ariz. Rev. Stat. Ann. § 13-912(a). However, Kaplan was a multiple offender, so the following Arizona restoration statute applies:

> Upon proper application, a person who has been convicted of two or more felonies who has received an absolute discharge from imprisonment in a federal prison may have any civil rights which were lost or suspended by his conviction restored by the presiding judge of the superior court in the county in which he now resides.

Ariz. Rev. Stat. Ann. § 13-910(A). The government contends that since Kaplan did not file the required application, his civil rights were never restored in Arizona.

Further, the government argues that even if Kaplan is treated as a first-time offender, that restoration statute does

not apply to a felon's ability to own guns. A change in the statute made in 1988 requires a special application to be made to the court for a felon to have his gun rights restored. Since Kaplan did not make this application in Arizona, says the government, his right to possess weapons was restricted entirely.

Kaplan concedes that he loses this issue if Arizona law governs, but argues that Michigan law applies to this case because he is a citizen of Michigan. He relies on the holdings in *Geyler* and *Edwards* and urges this court to adopt similar reasoning. Kaplan contends that the first sentence of the statutory language is independent of the second sentence and urges that the state of citizenship is the state that can restore the rights of its convicted felons, even if those felonies arose in federal court in another state. However, the direct application of the relevant language of *Geyler* and *Edwards* to this case is problematic. Neither case involved a choice between states, but addressed only the issue of state versus federal law, since the state of the predicate conviction was identical to the state of citizenship of the defendants in those cases. While this issue was not directly before those courts, the language in the opinions certainly indicates that the law of the state of citizenship applies to the restoration determination. On the other hand, in both *Breckenridge*, 899 F.2d at 542, and *Cassidy*, 899 F.2d at 549, we stated that we must look to the whole of the state law "of the state of conviction" to determine whether the convicted felon is entitled to vote, serve on a jury, hold public office, and possess firearms. However, this issue was not directly before either of those panels of the Sixth Circuit, so any statements made addressing it could be fairly classified as dicta. The resolution of this choice of law question, then, seemingly turns on what precedential value is due to the relevant statements in *Breckenridge* and *Cassidy*.

D. Michigan Law

The resolution of this case is made substantially less difficult by the fact that Kaplan admits that he can only prevail if Michigan law applies. He argues that Michigan has restored his civil rights. However, assuming, without deciding, that Michigan law applies, Kaplan still cannot successfully argue for the reversal of his felon in possession conviction in this case. In the recent opinion in *Driscoll*, a panel of this Circuit held that Michigan has not restored the civil rights of its felons for purposes of the federal felon-in-possession statute. *Driscoll*, slip op. at 12. In doing so, the *Driscoll* court expressly rejected the contrary conclusion reached by the Ninth Circuit in *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991). *Driscoll*, slip op. at 2.

It is clear that, in Michigan, Kaplan's rights to vote and run for public office have been restored. The only question, then, is whether his right to serve on a jury has also been restored. Once a felon's sentence is complete, there is no statute prohibiting that individual from sitting on a jury. There are however, court rules in Michigan that allow counsel, or a court *sua sponte*, to exclude felons from the jury through challenges for cause. In *Driscoll*, we held that those rules meant that a felon did not have the right to sit on a jury in Michigan and, therefore, that Michigan had not restored the civil rights of felons for purposes of § 921(a)(20). *Id.* at 12. [1]

[1] Since Michigan has not restored Kaplan's civil rights, we need not proceed to the second step of the statutory analysis, the issue of whether Michigan has restricted Kaplan's right to possess firearms. In any event, the Michigan provision in effect at the time of Kaplan's plea and sentencing only restricted the possession of pistols for people who had been convicted of or incarcerated due to a felony "in the past eight years." Mich. Comp. Laws Ann. §§ 28.422(1) & (3)(c). Kaplan was released from custody in December 1981, so the eight-year period expired for Kaplan in 1989. This Michigan law was changed two days after Kaplan was sentenced, so the eight-year limit still applies in this case. It seems, then, that Michigan had not placed restrictions on Kaplan's ability to own a gun. None of this is relevant, however, since Michigan had not restored Kaplan's civil rights.

To summarize, if either federal law or Arizona law applies to the restoration-of-rights issue in this case, Kaplan admits that he loses his appeal. Neither the federal government nor the state of Arizona has restored Kaplan's civil rights. In addition, even if Michigan law applies, Kaplan cannot prevail. So, even under Kaplan's best-case scenario in which Michigan law applies to the restoration-of-rights question, we would affirm his conviction under the felon-in-possession statute. Therefore, we need not decide any of the choice-of-law questions presented in this case to affirm Kaplan's conviction. We do not decide whether federal or state law would apply to the restoration of rights question in a case such as this. Nor do we announce any choice-of-law principle for deciding which state's law applies, if any. We merely affirm Kaplan's conviction, which is required under any possible resolution of these issues. Under the "rule of parsimony," then, we leave these questions for another day. We will resolve them when the facts of a particular case presented to us compels their resolution.

III

The False Statement Conviction

Count II of the information alleged that on several occasions between July 18, 1988 and May 3, 1989, Kaplan represented that he had not been convicted of any crime punishable by imprisonment for a term exceeding one year. The government alleges that he did so on Bureau of Alcohol, Tobacco, and Firearms Forms 4473, which gun purchasers are required to fill out. Section 922(a)(6) of Title 18 makes it unlawful for a person to make a false statement in relation to a gun purchase. Under the statute, the government must prove that the defendant knowingly made false or fictitious statements intended or likely to deceive the firearms dealers with respect to any fact material to the lawfulness of the sale.

Question 8b of the Form 4473 is the relevant question in this case. Prior to amendment, question 8b asked:

> Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter — a yes answer is necessary if the judge could have given a sentence of more than year. Also, a yes answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute . . . .)

The question was later amended to reflect the 1986 change in § 921(a)(20), and stated that a yes answer was not required if the conviction had been expunged, set aside, or pardoned, or if civil rights had been restored. Kaplan contends that since the charged offenses in count II all occurred well after 1986, he is not guilty of making a false statement because his

civil rights had been restored by Michigan. He says that his "no" answer to question 8b was no longer false after the 1986 change in the law.

However, since Kaplan's civil rights were not in fact restored, even by the state of Michigan, his statements to the contrary on either the original or amended ATF forms were clearly false. We therefore affirm Kaplan's conviction for making false statements in connection with the acquisition of firearms, in violation of 18 U.S.C. § 922(a)(6).

IV

The Sentencing Issue

In sentencing Kaplan, the district court held that the offense level reduction in cases where the defendant possessed all ammunition and firearms solely for lawful sporting purposes or a part of a collection (U.S.S.G. § 2K2.1(b)(2)) could not apply to a conviction for being a felon in possession of a firearm. We review this issue of law de novo. The government concedes that the district court erred in concluding that this reduction could not apply as a matter of law to the case at bar. The case law supports this concession. *United States v. Wilson*, 878 F.2d 921, 924 (6th Cir. 1989). However, the government claims that the district court also made a factual finding that it would be inappropriate to grant this adjustment under the facts of this case and that this factual finding must be affirmed unless clearly erroneous.

Kaplan argues that the findings of the court were not "factual" at all but were based on legal misperceptions. The court stated that shooting the gun at ranges in preparation for competitive shooting matches is not a lawful sporting

purpose. Further, the court found that the firearms did not constitute a collection for purposes of the adjustment because the display included weapons and memorabilia that were not for sporting purposes. Kaplan contends that these are fundamentally errant legal determinations of the definitions of the guidelines terms of "sport" and "collection" and, therefore, are subject to de novo review. Kaplan maintains that the district court's narrow definitions of those words were wrong and that his collection of weapons and his use of those weapons for sport entitle him to the adjustment.

U.S.S.G. § 2K2.1(b)(2) provides:

> (2) If the defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

According to Application Note 10 to this guideline, whether the defendant possessed the firearms and ammunition solely for "lawful sporting purposes and collection" is determined by the relevant surrounding circumstances including the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history, and the extent to which possession was restricted by local law.

The district court in this case found that target shooting at gun ranges in preparation for shooting matches is not a lawful sporting purpose. Further, the court found that it was not a "collection" because the display of firearms included memorabilia and other weapons. These are not

technically factual findings, but constitute a mistaken application of a legal rule, which we review de novo.

Kaplan had a large collection of firearms, which he displayed on the walls of a locked room in his home. The collection contained other law enforcement and paramilitary memorabilia. None of the weapons were loaded and no other weapons were found anywhere else in Kaplan's home. We disagree with the district court that the fact that the guns were displayed with other memorabilia indicates that they do not qualify as a "collection" for purposes of this adjustment. On the contrary, the various posters, patches and other various weapons support Kaplan's contention that he maintained these weapons as part of a collection.

Further, the district court's finding that practicing at a gun range in preparation for competitive shooting matches did not constitute a "lawful sporting purpose" was also an erroneous application of § 2K2.1(b)(2). If this gun range activity was indeed practice for a lawful sport-shooting purpose, it too constitutes a lawful sporting purpose.

We therefore reverse the district court's decision refusing, as a matter of law, to apply § 2K2.1(b)(2) to felon-in-possession cases. In addition, we reject the district court's proffered reasons for refusing to apply the reduction to these facts, as those reasons are simply mistaken legal interpretations of the applicable guideline. We remand this case to the district court, so that it may reconsider the question whether the sport/collection reduction applies to the facts of this case in light of the correct legal standard explicated herein. If the district court chooses to deny the reduction in this case, it must do so for reasons other than those that we have found illegitimate.

V

In sum, we AFFIRM Kaplan's convictions for being a felon in possession of a firearm and for making false statements in connection with the acquisition of firearms. Further, we REVERSE the district court's refusal to apply the sport/collection adjustment to this case. We therefore REMAND this case to the district court for a reconsideration of Kaplan's sentence. The district court is ordered to render a decision on the application of the sport/collection adjustment based on the facts of this case and consistent with this opinion.

(2)

No. 93-445

In the Supreme Court of the United States

OCTOBER TERM, 1993

LENARD RAY BEECHAM AND KIRBY LEE JONES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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5 pp

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the federal firearms charges against them were unfounded because state statutes restoring their civil rights eliminated the restriction on their right to possess firearms. Pet. 7-11.

1. Petitioner Beecham was indicted by a federal grand jury sitting in the Eastern District of North Carolina. He was charged with five counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); one count of making a false statement in connection with the purchase of a firearm, in violation of 18 U.S.C. 922(a)(6); and five counts of dealing in firearms without a license, in violation of

18 U.S.C. 922(a)(1)(A). The felon-in-possession and false statement counts alleged that he had a prior federal felony conviction in the Western District of Tennessee. Following a jury trial, Beecham was convicted on all counts. Pet. App. 2a-3a.

On January 24, 1992, the district court granted a post-verdict judgment of acquittal on the false statement and felon-in-possession counts on the ground that the State of Tennessee had restored Beecham's civil rights after the completion of his federal sentence and that the State's act had the effect of making the federal felony conviction unavailable, under 18 U.S.C. 921(a)(20), as a qualifying "prior felony conviction" for purposes of the federal firearms laws. Pet. App. 5a.

2. Petitioner Jones was indicted by a federal grand jury sitting in the Northern District of West Virginia. He was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and with making a false statement in connection with the purchase of a firearm, in violation of 18 U.S.C. 922(a)(6). The indictment alleged that he had a prior federal felony conviction in the Southern District of Ohio and prior state convictions in West Virginia. Pet. App. 11a-12a.

The government conceded in the district court that the state convictions could not serve as predicate felonies under 18 U.S.C. 921(a)(20) because West Virginia had restored Jones's civil rights upon the completion of his sentences. The government contended, however, that the federal conviction remained a viable predicate conviction under the federal firearms laws. Pet. App. 12a.

On November 4, 1992, the district court dismissed the indictment. Accepting the recommendation of the magistrate, Pet. App. 25a-30a, the district court ruled that Jones's federal conviction did not qualify as a conviction within the meaning of the federal firearms laws because West Virginia had restored his civil rights. Pet. App. 10a.

3. The court of appeals reversed the judgment of acquittal in *Beecham* (Pet. App. 1a-9a) and the order dismissing the indictment in *Jones* (Pet. App. 10a-22a). The court recognized that its ruling conflicted with *United States* v. *Geyler*, 932 F.2d 1330 (9th Cir. 1991), and *United States* v. *Edwards*, 946 F.2d 1347 (8th Cir. 1991), but it nevertheless concluded that Congress intended for a State's post-conviction restoration scheme to affect only the rights of persons convicted in that State's courts. Pet. App. 14a.

4. Petitioners contend (Pet. 7-11) that 18 U.S.C. 921(a)(20) allows an individual convicted of a federal felony whose civil rights are restored by operation of state law to possess firearms lawfully. They note that the court below recognized that the decisions against them conflict with the Eighth and Ninth Circuits' decisions in *Edwards* and *Geyler*.

Although we believe that the court below correctly determined that petitioners could not possess firearms lawfully, we agree that the courts of appeals are divided, and that the issue is one that will ultimately merit review by this Court. However, because both of these cases are in an interlocutory posture, we suggest that neither case is ripe for review at this time. The court of appeals' decision places each petitioner in precisely the same position he would have occupied if the district court had denied relief. After

imposition of sentence, petitioner Beecham can take an appeal to the court of appeals raising any issues that may be available to him and preserving the claim that he raised here. If petitioner Jones is convicted following a trial on the merits, he also can appeal to the court of appeals raising any issues that may be available to him. Either petitioner whose conviction is affirmed on appeal will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review of the court of appeals' decisions at this time would be premature.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

OCTOBER 1993

* Because both of these cases are in an interlocutory posture, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

(3)

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The Solicitor General acknowledges that the Fourth Circuit's decisions in these cases conflict squarely with decisions on the same legal issue by the Eighth and Ninth Circuits. The Solicitor General also agrees "that the courts of appeals are divided, and that the issue is one that will ultimately merit review by this Court." Memorandum for the United States in Opposition, p. 3. The only ground suggested by the Solicitor General for denying certiorari is that, prior to

the sentencing of the defendants, the cases "are in an interlocutory posture." *Id.*

The assertedly "interlocutory" character of the decisions is, however, an inadequate reason for denying this petition.

First, there is no theoretical possibility — as there ordinarily is in the case of other interlocutory rulings — that the final outcome of the litigation will moot any request for review. As a consequence of the Fourth Circuit's ruling, petitioner Jones entered into a plea agreement in which he reserved the right to seek review in this Court of the Fourth Circuit's ruling. Although the parties requested entry of the agreement and sentencing, the district court refused, on July 22, 1993, to act on the plea agreement until after this petition is decided. See Exhibit I, pp. 1a-2a, *infra*.

To force petitioner Jones to demand a sentence pursuant to the plea agreement and then to go through the formality of an appeal on an issue which that court has already definitely resolved would exalt form over substance. The issue in Jones' case is now ripe and ready for plenary review.

Petitioner Beecham is scheduled to be sentenced on October 26, 1993, on the six counts on which the district court had entered a judgment of acquittal after an adverse jury verdict. Regardless of the severity of the sentence, petitioner Beecham will seek to set these convictions aside because maintenance of these convictions on his record will prejudice him in future business activities. In his case, as well, no purpose is served by forcing him to file pleadings in the district court and to take the time of the court of appeals for an "appeal" — which is merely a formality — of an issue that has already been decided.

Second, the legal issue presented in the petition — on which the Circuits are currently in conflict — should be decided sooner rather than later. It directly affects primary conduct. May a certain class of persons — *i.e.*, those who have federal convictions that have been affected by local restoration of rights — possess firearms? As we noted in our petition, persons who are in this category residing in the five States in the Fourth Circuit may not possess firearms. Similarly situated residents of the 16 States in the Eighth and Ninth Circuits are entitled, under federal law, to own or possess firearms. And residents of the remaining 29 States and of the District of Columbia who are in the defined category are wholly uncertain. Is their possession of firearms criminally prohibited — as the Fourth Circuit has declared — or is it entirely lawful — as the Eighth and Ninth Circuits have ruled? Any delay in the resolution of this legal issue significantly increases the likelihood that individuals who seek to abide by the law will be unwittingly ensnared. We are surprised, therefore, that the Solicitor General seeks to extend the duration of the period of uncertainty for no apparent benefit. We urge this Court to reject the suggestion that a legal issue that it will ultimately have to resolve should be indefinitely delayed at the expense of those who need to know *today* what the law demands of them.

This Court's reluctance to review federal criminal convictions under 28 U.S.C. § 1254(1) before there is a final judgment of conviction and sentence is entirely a prudential rule. Stern, Gressman & Shapiro, Supreme Court Practice § 4.18, p. 224 (6th ed. 1986). It does not relate to the jurisdiction of the Court. In a case such as this one, where a prompt decision on the merits is needed so that law-abiding citizens may know the standard to which they must conform and where the immediate case or controversy will not disappear if action is delayed until a later juncture of the

proceedings, there is no reason to defer consideration of the dispositive legal issue.

For the foregoing reasons, together with the reasons stated in our petition, certiorari should be granted.

Respectfully submitted,

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Attorney for Kirby Lee Jones

October 1993

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA**

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL NO. 92-46

KIRBY LEE JONES,

Defendant.

ORDER

The Court has received a copy of a plea agreement in the above-styled criminal action wherein it is indicated that the defendant will enter a plea of guilty to Count One of the Indictment. Inasmuch as Paragraph Nine of the plea agreement reflects that the defendant will file a Petition for a Writ of Certiorari to the United States Supreme Court, it is

ORDERED that further action in this matter and consideration of the plea agreement shall be held in abeyance until the defendant's appeal is exhausted. It is further

ORDERED that the period of delay resulting from the appeal and from the Court's consideration of the issues raised and suggested by the said plea agreement shall be excluded in

computing the time within which the trial of the offense charged in the above-styled criminal action must commence in accordance with the provisions of 18 U.S.C. § 3161(h)(1)(E) an (I).

Enter: July 22nd, 1993.

/ s / Robert R. Maxwell
United States District Judge

/ s / Deputy Clerk

(4)

No. 93-445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LENARD RAY BEECHAM
and
KIRBY LEE JONES,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1993
CERTIORARI GRANTED NOVEMBER 15, 1993

34 pp

INDEX

DOCKET ENTRIES

United States v. Lenard Ray Beecham

Date	PROCEEDINGS
10/15/91	Indictment filed.
1/8/92	Jury Trial at Raleigh before Judge DuPree. Jury present, sworn and impaneled. Jury trial began. Opening statement by Government. Defense presents opening statement. Government presents evidence.
1/9/92	Jury trial continues. Government rests evidence. Defense moves for judgment of acquittal of all charges of possession of firearms by felon—overruled. Defendant presents evidence. Government presents closing argument. Defense presents closing argument. Rebuttal argument by Government. Jury instructions given.
1/9/92	Defendant's Motion for Judgment of Acquittal of all Charges of Possession of Firearms by Felon.
1/10/92	Jury trial continues—jury deliberates—jury verdict as follows: Guilty as to counts 1, 3, 5, 7 & 11 Guilty as to counts 2, 6, 8, 9 & 10 Guilty as to count 4
1/10/92	Memorandum of Law in Opposition to Defendant's Motion for Judgment of Acquittal of All Charges of Possession of Firearm by Felon.
1/15/92	Motion *Non Obstante Veridicto* to Set Aside Verdicts and for Judgments of Acquittal of Possession of Firearms By Felon and False Statement to Acquire Firearm.
1/15/92	Supplemental Response to Motion for Judgment of Acquittal of All 18 U.S.C. § 922(g) Charges and To Set Aside Guilty Verdicts.
1/16/92	Motion Hearing—Judge DuPree—Raleigh. Government and Defense present oral argument and rebuttal arguments. Court to review and then to make written decision.

Date	PROCEEDINGS
1/24/92	Order—re: Motion for Judgment of Acquittal—Defendant's Motion for Judgment of Acquittal in regard to counts 1, 3, 4, 5, 7 & 11 is granted—(Dupree, J.).
2/24/92	Notice of Appeal filed in United States Court of Appeals for the Fourth Circuit
6/1/92	Judgment in a Criminal Case—(offenses after 11/1/87) $250.00 special assessment (Counts 2, 6, 8, 9 & 10) (other Counts dismissed). Sentencing before Judge Britt. 18 months imprisonment on each count to run concurrently. Defendant to be provided with mental health treatment. Defendant to be allowed to serve his sentence at Federal Prison Camp—Seymour Johnson AFB-Goldsboro. Defendant allowed to report before 2:00 p.m. on date designated by United States Marshal. 36 months supervised release—each count to run concurrently. Defendant must report within 72 hours to United States Parole Office in district upon release. Defendant must not possess a firearm or destruction device. Defendant must not incur new credit charges or open additional lines of credit without the approval of the parole officer. Defendant must provide parole officer with access to any required financial information. $3,000 fine—without interest—to be paid in equal monthly installments during period of probation—to begin and continue during incarceration. No restitution ordered—no identifiable victim. Statement of Reasons.
6/3/92	Order—judgment in this matter entered on 6/1/92 is hereby amended on page 1 to reflect that Counts 1, 3, 4, 5, 7 & 11 were dismissed by the court upon motion of the defendant. Except as herein modified, the judgment is, in all respects, ratified and confirmed.
6/10/92	Notice of Appeal.

Date	PROCEEDINGS
6/2/93	Unpublished opinion of Court of Appeals—Affirmed in part, reversed in part and remanded by unpublished *per curiam* opinion.
6/28/93	Judgment of Court of Appeals—The court affirmed in part and reversed in part the judgment of the District Court. The cases are remanded to the District Court with Instructions.
6/29/93	Order of Court of Appeals—It is ordered that the petition for rehearing and suggestion for rehearing *en banc* are denied.
9/20/93	Defendant files Petition for a Writ of Certiorari in the United States Supreme Court.
10/26/93	Resentencing at Raleigh before Judge Britt: Defendant present with counsel. Resentencing pursuant to remand from 4th Circuit. All counts included 1-11. Bureau of Prisons—21 months, Counts 1-11 all to run concurrently. Supervised Release—36 months Counts 1-11, all to run concurrently. Fine $3,000.00. Special Assessment—$50.00 each count, total $550.00. Payment schedule to be established during imprisonment pursuant to inmate financial responsibility program all remaining penalties to be paid under United States Parole Office supervision provided all penalties are paid before lapse of supervised release. Motion to release pending appeal is denied.
10/26/93	Judgment in a Criminal Case: Bureau of Prisons 21 months Counts 1-11, all concurrent. Supervised release, 36 months Counts 1-11 concurrent. Fine $3,000.00. Special Assessment—$550.00, interest waived. Fine to be paid pursuant to inmate financial responsibility program and under supervision of United States Parole Office. Statement of reasons.
11/15/93	United States Supreme Court grants Writ of Certiorari.

DOCKET ENTRIES

United States v. Kirby Lee Jones

Date	PROCEEDINGS
3/3/92	Indictment filed.
4/28/92	Defendant's Motion to Dismiss Indictment.
6/18/92	Government files Response to Defendant's Motion to Dismiss Indictment.
10/21/92	United States Magistrate issues Proposed Findings of Fact and Recommendation for Disposition.
11/4/92	District Court Order granting Defendant's Motion to Dismiss Indictment.
11/30/92	Government files notice of appeal in United States Court of Appeals for the Fourth Circuit.
5/24/93	Court of Appeals enters opinion reversing District Court's Order and remanding with directions.
6/4/93	Court of Appeals—Defendant files Motion to Stay Mandate Pending Application for Certiorari.
6/14/93	Court of Appeals denies Motion to Stay Mandate Pending Application for Certiorari.
7/9/93	Court of Appeals amends decision by Order.
7/19/93	Defendant enters into Plea Agreement.
7/22/93	District Court stays further action on plea agreement pending exhaustion of Defendant's appeals.
9/20/93	Defendant files Petition for a Writ of Certiorari in United States Supreme Court.
11/15/93	United States Supreme Court grants Writ of Certiorari.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 91-84-01-CR-5 BR

UNITED STATES OF AMERICA

v.

LENARD RAY BEECHAM

INDICTMENT

[Filed Oct. 15, 1991]

The Grand Jury charges that:

COUNT ONE

On or about November 20, 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Browning Hi-Power 9 mm., semi-automatic pistol, serial number 245PN69407, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT TWO

On or about November 20, 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, de-

fendant herein, engaging in the business of dealing in firearms without a license, knowingly received a firearm, that is, a Browning Hi-Power 9 mm., semi-automatic pistol, serial number 245PN69407, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT THREE

On or about December 22, 1990, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Stoeger (IGA), .410 gauge double barreled shotgun, Coachgun model, serial number 313170, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT FOUR

On or about December 22, 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, in connection with his acquisition of a firearm that is, a Stoeger (IGA), .410 gauge double barreled shotgun, Coachgun model, serial number 313170, from Thompson's Firearms and Fishing Supplies, Raleigh, North Carolina, a licensed dealer, knowingly made a false and fictitious written statement to Thompson's Firearms and Fishing Supplies, which statement was likely to deceive Thompson's Firearms and Fishing Supplies, as to a fact material to the lawfulness of such acquisition of the said firearm to the defendant under chapter 44 of Title 18, United States Code, in that the defendant represented that he had not been convicted in any court of a crime punishable by a term of imprisonment exceeding one year, when in fact, as the defendant then well knew, he had been so convicted, in violation of Title 18, United States Code, Sections 922(a)(6).

COUNT FIVE

On or about January 31, 1991, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, an Ithaca, model 1911A1, .45 caliber, semi-automatic pistol, serial number 822430, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT SIX

On or about January 31, 1991, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly received a firearm, that is, an Ithaca, model 1911A1, .45 caliber, semi-automatic pistol, serial number 822430, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT SEVEN

On or about February 2, 1991, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Smith & Wesson, .44 magnum, model 29, blue steel, revolver, serial number AZE5222, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT EIGHT

On or about February 2, 1991, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly received a firearm, that is, a Smith & Wesson, .44 magnum, model 29, blue steel,

revolver, serial number AZE5222, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT NINE

On or about February 21, 1991, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly sold a firearm, that is, a Smith & Wesson, .44 magnum, model 29, blue steel, revolver, serial number AZE5222, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT TEN

On or about the year 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly sold firearms, that is, a 9 mm., semi-automatic pistol, serial number unknown, and a 12 gauge Browning pump shotgun, serial number unknown, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT ELEVEN

On or about March 14, 1991, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, firearms, that is, a Browning, 12 gauge, pump-action shotgun, serial number 22706PT152, a Winchester, model 9422M, lever action, .22 magnum caliber rifle, serial number F474908, a Titan, Tigress, .25 caliber, semi-automatic pistol, serial number DE17468, and quantities of ammunition, .380 auto., .25 auto., 9mm., .44 magnum, .45 auto., 12 gauge, .30 carbine, .30-06

Springfield, .22 long rifle, .357 magnum, and .41 magnum calibers, in violation of Title 18, United States Code, Sections 922(g)(1).

A TRUE BILL

/s/ Illegible
Foreman

Date: 10/15/91

MARGARET PERSON CURRIN
United States Attorney

By: /s/ Richard B. Conely, Sr.
RICHARD B. CONELY, SR.
Assistant United States Attorney
Criminal Division

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 91-84-01-CR-5

UNITED STATES OF AMERICA,
Plaintiff

vs.

LENARD RAY BEECHAM,
Defendant

Defendant, Lenard Ray Beecham, was convicted on eleven counts of violations of 18 U.S.C. § 922(g)(1), 18 U.S.C. § 922(a)(1), and 18 U.S.C. § 922(a)(6). The matter is presently before the court on defendant's motion to set aside the jury verdict as to counts one, three, four, five, seven and eleven based on the renewal of his motion for judgments of acquittal as to those counts.

Count four arises under 18 U.S.C. § 922(a)(6) and deals with knowingly making a false statement to a firearms dealer with respect to the purchase of a firearm. Counts one, three, five, seven, and eleven arise under 18 U.S.C. § 922(g)(1) and relate to unlawful possession of a firearm by a convicted felon.

The issue of contention in regard to each of these counts is whether Beecham actually had a prior conviction at the time he violated these two statutes as that term is defined under federal law. The question is crucial because a prior conviction is an essential element of both statutes and therefore the jury's verdicts as to those

counts cannot stand unless Beecham does in fact have a prior conviction for purposes of these statutes.

There is no dispute over the fact that in 1979 Beecham was convicted for a violation of 18 U.S.C. § 922(h), a felony offense, in the United States District Court for the Western District of Tennessee. However, defendant contends that since Beecham has served the sentences imposed upon his conviction of the predicate offense and has been granted a final release from incarceration and supervision, he has had his civil rights fully restored and therefore no longer has a prior conviction as that term is defined for purposes of Section 922(g)(1) and Section 922(a)(6). The government, conversely, argues that Beecham has not had these rights fully restored and that therefore he currently has a prior conviction under federal law.

I. *Which Definition of "Conviction" Applies?*

18 U.S.C. § 921(a)(20) defines the term "conviction" within the meaning of Section 922(g)(1) and Section 922(a)(6), stating, in pertinent part, as follows:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (Supp. 1991).

This statutory provision, while certainly not unambiguous, is the governing definition as to what constitutes a prior conviction for purposes of Sections 922(g)(1) and 922(a)(6). However, Section 921(a)(20) was

not enacted until May 19, 1986 and did not become effective until 180 days after that date. Consequently, the government contends that this provision does not apply to the case *sub judice* since the predicate offense that constitutes Beecham's prior "conviction" took place in Tennessee federal court in 1979, well before the enactment of Section 921(a)(20).

Prior to the 1986 enactment of the amended version of Section 921(a)(20), the term "conviction" was not defined by statute and the controlling definition of the term was laid down by the United States Supreme Court in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983). In *Dickerson* the Court held that the term "convicted" was "a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State." *Id.* at 111-112. The Court went on to rule that a state's expungement of a defendant's criminal record would have no effect on that defendant's conviction under the federal firearms statutes. *Id.* at 113-117.

As support for its argument that the *Dickerson* definition of "conviction" should be applied to the case at bar rather than the Section 921(a)(20) definition, the government cites *United States v. Brebner*, No. 89-30100, 1991 U.S. App. WESTLAW 256177 (9th Cir., December 9, 1991), a recent case in which the Ninth Circuit refused to apply Section 921(a)(20) retroactively. However, in that case the *actions constituting a violation of the federal firearms statutes* had occured prior to the effective date of Section 921(a)(20). In other words the Ninth Circuit's refusal to apply Section 921(a)(20) retroactively was *not* due to the fact that the *predicate offenses* took place before the effective date of the statute. In the case *sub judice*, Beecham's violations of Sections 922(g)(1) and 922(a)(6) occurred well after the effective date of Section 921(a)(20). Therefore, the fact that Beecham's predicate offenses took place prior to this date

is irrelevant and will not bar the application of Section 921(a)(20).

II. *Which Jurisdiction's Law is Controlling?*

Having determined that Section 921(a)(20) does apply, the next question is whether Tennessee law—the law of the jurisdiction in which Beecham's predicate offense occurred—or North Carolina law—the law of the jurisdiction in which Beecham's present conviction took place—is applicable. Case law demonstrates, however, that the relevant jurisdiction for purposes of this inquiry is the state in which the predicate offenses occurred. The most direct precedent is *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991), in which the Fourth Circuit stated the following:

> [I]n every § 922(g)(1) prosecution, the court must refer to the laws of the jurisdiction in which such purported *predicate* conviction occurred. This inquiry requires an analysis of whether and to what extent the jurisdiction in which the prior conviction occurred "restores the civil rights" of ex-felons.

Essick, 935 F.2d at 30 (emphasis added).

Furthermore, in *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991), the Fourth Circuit removed all doubt that the rule laid down in *Essick* was the governing rule in this circuit. In *McBryde*, the defendant was convicted in a South Carolina federal court for a violation of Section 922(g)(1). His predicate offense was a state court conviction in North Carolina. *Id.* at 534. The Fourth Circuit held that the sole question in that case was whether the restoration of the defendant's civil rights under North Carolina law—the law of the predicate offense state—would make him immune from prosecution under Section 922(g)(1). The court answered that question in the affirmative. *Id.* at 534-36.

Thus, given the rule articulated by the Fourth Circuit in *Essick* and applied in *McBryde*, the court concludes

that Tennessee's civil rights restoration statute is applicable rather than North Carolina's statute.[1]

III. *Did the Government Meet Its Burden of Proof in Regard to the Prior "Conviction" Element of Sections 922(g)(1) and 922(a)(6)?*

The current Tennessee statute dealing with restoration of civil rights for felons provides that all persons who have been deprived of their rights of citizenship by a court of law may have these rights restored upon, *inter alia*, final release from incarceration or probation. Tenn. Code Ann. § 40-29-105(b)(1)(C) (1991). The statute goes on to say that persons eligible for restoration of their rights can request a certificate of restoration and are entitled to receive that certificate from the pardoning authority or an agent or officer of the supervising or incarcerating authority. Tenn. Code Ann. § 40-29-105(b)(3)(A-B) (1991).

Section 40-29-105 expressly states that it applies only to felons convicted of infamous crimes *after* July 1, 1986 and that the restoration provisions applicable to felons convicted of infamous crimes *prior* to July 1, 1986 are contained in Sections 40-29-101 through 40-29-104. Since Beecham's predicate offenses clearly arose prior to July 1, 1986, any restoration of his rights would be governed by this earlier statute. Section 40-29-101 provides that a person deprived of his rights of citizenship may petition the circuit court for restoration of those rights. Tenn. Code Ann. § 40-29-101 (1991). The subsequent provisions of the statute elaborate on this procedure. *See* Tenn. Code Ann. §§ 40-29-101 through 40-29-104.

[1] The government argues that because Beecham's prior conviction was in federal court neither Tennessee law nor North Carolina law but rather federal law should govern as to whether Beecham has had his civil rights restored. However, at least two circuits have rejected this view. *See United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991); *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991). Since the government has cited no cases that express a contrary view on this issue, the court sees no reason to depart from these precedents.

A fundamental tenet of our constitutional system is the requirement that in a criminal trial the government has the burden of proof in regard to each element of the crime. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975). Consequently, the government had the burden of proving beyond a reasonable doubt that Beecham did in fact have a prior "conviction" as defined in regard to the firearms statutes. Therefore, the government was obligated to show that Beecham had not had his civil rights restored under Tennessee law. While the law is clearly established that the burden of proof is on the defendant in regard to an affirmative defense,[2] a defense that relates to an element of the crime is not an affirmative defense and, therefore, the government must prove it beyond a reasonable doubt. The government argues that the restoration of rights issue is either an affirmative defense or a statutory exception and that therefore the burden was on defendant in regard to this question.

In *Essick, supra*, the Fourth Circuit dealt with a similar burden of proof issue in relation to Section 922(g)(1). In that case the contested issue involved the question of whether Essick's federal firearms conviction occurred within five years of his release from state supervision, a question that was crucial under North Carolina law for purposes of determining whether a prior "conviction" existed. There—as here—the government made the argument that all it needed to do to prove a prior "conviction" in a Section 922(g)(1) trial was to show that at some time in the past the defendant had been convicted of a felony and that the question of whether the defendant's civil rights had been restored was a defense for which the defendant had the burden of proof. *Essick*, 935 F.2d at 31.

[2] *See Patterson v. New York*, 432 U.S. 197 (1977).

The Fourth Circuit refused to adopt this view, holding that "[b]ecause a prior 'conviction,' *i.e.*, one for which the civil right to possess a firearm has *not* been restored, is an element of a § 922(g)(1) violation, the government's proof failed" insofar as they failed to put forth evidence showing that the Section 922(g)(1) violation had occurred within five years of the predicate offense. *Id.* Thus, *Essick* clearly rejects the government's argument that the restoration of rights question is not an essential element of a Section 922(g)(1) violation that must be established during the prosecution's case beyond a reasonable doubt. Therefore, since the government admittedly failed to prove that Beecham's civil rights had not been restored under Tennessee law, its case was deficient and the jury's guilty verdict as to those counts for which a prior "conviction" was an essential element must be set aside.

IV. *Conclusion.*

For the foregoing reasons defendant's motion for judgment of acquittal in regard to counts one, three, four, five, seven and eleven is granted.

SO ORDERED.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

January 24, 1992.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 91-84-01-CR-5-BR

UNITED STATES OF AMERICA

v.

LENARD RAY BEECHAM

ORDER

[Filed June 3, 1992]

The judgment in this matter entered on 1 June 1992 is hereby amended on page 1 to reflect that Counts 1, 3, 4, 5, 7 and 11 were dismissed by the court upon motion of the defendant.

Except as herein modified, the judgment is, in all respects, ratified and confirmed.

This 3 June 1992.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5868
CR-91-84

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

LENARD RAY BEECHAM,
Defendant-Appellant

ORDER

Filed November 23, 1993

Appellant has filed a motion for bail pending appeal.

The Court grants the motion.

Entered at the direction of Judge Hall with the concurrence of Chief Judge Ervin and Judge Hamilton.

FOR THE COURT

/s/ Bert M. Montague
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Criminal No. 92-00046

UNITED STATES OF AMERICA,
Plaintiff,

v.

KIRBY LEE JONES,
Defendant.

Violation: 18 USC 922(g)(1)
18 USC 924(a)(2)
18 USC 922(a)(6)
18 USC 924(a)(1)(B)

INDICTMENT

[Filed March 3, 1992]

The Grand Jury charges that:

COUNT ONE

That on or about September 13, 1990, in Burnsville, Braxton County, within the Northern District of West Virginia, the defendant, KIRBY LEE JONES, being a person who had been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, that is to say, on or about October 30, 1969, KIRBY LEE JONES was convicted in the Circuit Court of Braxton County, West Virginia, in Case Number 343, of Breaking and Entering, a crime punishable by imprisonment for a term exceeding one year; on or about June

11, 1971, KIRBY LEE JONES was convicted in the United States District Court for the Southern District of Ohio, Columbus, Ohio, in Case Number 4546, of Transporting in Interstate Commerce a Stolen Automobile Knowing the Same to have been Stolen, a crime punishable by imprisonment for a term exceeding one year; and on or about August 30, 1978, KIRBY LEE JONES was convicted in the Circuit Court of Fayette County, West Virginia, in Case Number 78-F-58, of Forgery, a crime punishable by imprisonment for a term exceeding one year; did knowingly receive and possess a firearm, to wit: a Remington, Model 700BDL, .243 caliber rifle, Serial Number C6419679, which firearm had been shipped in interstate commerce; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

COUNT TWO

On or about September 13, 1990, in Burnsville, Braxton County, West Virginia within the Northern District of West Virginia, the defendant, KIRBY LEE JONES, in connection with the acquisition of a firearm, that is a Remington, Model 700 BDL, .243 caliber rifle, Serial Number C6419679, from Anglers Roost Sport Shop, a federally licensed dealer in firearms, knowingly made a false and fictitious statement likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of the firearm pursuant to Chapter 44, Title 18, United States Code, in that he stated on a Department of Treasury, Bureau of Alcohol, Tobacco and Firearms Form 4473, that he was not prohibited by the provisions of Chapter 44, Title 18, United States Code, from receiving a firearm that had been shipped in interstate or foreign commerce, when in truth and in fact he was a person who had been convicted of crimes punishable by imprisonment for a term exceeding one year and was prohibited from receiving a firearm that had been shipped in interstate or foreign commerce by Chapter 44 of Title

18, United States Code; in violation of Title 18, United States Code, Sections 922(a)(6) and 924(a)(1)(B).

A TRUE BILL

/s/ Patrick W. Homer
Foreperson of the Grand Jury

/s/ Lisa A. Grimes
for WILLIAM A. KOLIBASH
United States Attorney

[STATE SEAL]

STATE OF WEST VIRGINIA
DEPARTMENT OF CORRECTIONS
CHARLESTON

OFFICIAL CERTIFICATE OF DISCHARGE

THIS IS TO CERTIFY THAT
KIRBY LEE JONES, HCC-10982

Is hereby discharged from parole and any or all civil rights heretofore forfeited are restored.

Done this the 21st day of May 1982.

DEPARTMENT OF CORRECTIONS

/s/ William R. White
Deputy Commissioner

/dl

cc: Area D/7
HCC
Fayette County
File

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

Criminal No. 92-00046

UNITED STATES OF AMERICA,
Plaintiff,

v.

KIRBY LEE JONES,
Defendant.

ORDER

Filed Nov. 4, 1992

Pending the Court's consideration of the Proposed Findings of Fact and Recommendation for Disposition filed by Magistrate Judge Core in the above-styled criminal action, the Court, in order to safeguard every eventuality of the Speedy Trial Act, scheduled the above-styled criminal action for trial on November 17, 1992. On November 2, 1992, the United States filed a Motion for Review and Appeal of the Proposed Findings of Fact and Recommendation for Disposition.

The Court has now had an opportunity to carefully review the government's motion and the findings and recommendation of the Magistrate Judge, filed with the Court on October 21, 1992, and the Court is of the opinion that the findings and recommendation of the Magistrate Judge as to the sufficiency of the charges contained in the within Indictment are a correct and accurate

statement of the law and the recommendation of the Magistrate Judge to the Court that the Indictment herein be dismissed is entirely appropriate. In reaching the conclusion that the United States Magistrate Judge has made a proper determination based upon the circumstances presented in this criminal action, the Court has carefully reviewed the record before it and has conducted a de novo review of all-matters before the Magistrate Judge. As reflected above, it appears to the Court that the Magistrate Judge's Proposed Findings of Fact and Recommendations for Disposition accurately reflect the law applicable to the facts and circumstances before the Court in this criminal action. The government's Motion for Review and Appeal has not raised any issue or issues which have not thoroughly and accurately been considered by the Magistrate Judge. Accordingly, it is

ORDERED that Magistrate Judge Core's Proposed Findings of Fact and Recommendations for Disposition filed in this case be, and the same are hereby, accepted in totality, and the defendant's Motion to Dismiss the Indictment be, and the same is hereby, GRANTED.

ENTER: November 4, 1992.

/s/ Robert E. Maxwell
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5820
CR-92-46

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

KIRBY LEE JONES,
Defendant-Appellee

ORDER

FILED June 14, 1993

Appellee has filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Hall, with the concurrence of Judge Luttig and Judge Hilton.

For the Court,

/s/ Bert M. Montague
Clerk

[Emblem]

U.S. DEPARTMENT OF JUSTICE

United States Attorney
Northern District of West Virginia

Post Office Box 591
Wheeling, West Virginia 26003

July 8, 1993

R. Russell Stobbs
Attorney at Law
P.O. Box 1167
Weston, WV 26452

IN RE: UNITED STATES v. KIRBY LEE JONES
CRIMINAL NO. 92-00046

Dear Mr. Stobbs:

This letter will confirm the conversations with you concerning your client, KIRBY LEE JONES, (hereinafter referred to as Mr. Jones).

All references to the "Guidelines" refer to the guidelines established by the United States Sentencing Commission, effective November 1987, as amended.

The following numbered paragraphs indicate the substance of the agreement which has been discussed. It is accordingly agreed between the United States and Mr. Jones as follows:

1. Mr. Jones agrees to plead guilty to Count One of the Indictment charging him with Possession of a Firearm by a Convicted Felon, in violation of Title 18, United States Code, Section 922(g)(1).

2. The maximum penalty to which Mr. Jones will be exposed by virtue of his plea of guilty for a violation of Title 18, United States Code, Section 922(g)(1) as stated

in paragraph 1 above, is imprisonment for a period of ten (10) years, supervised release for a period of at least three (3) years, a fine of $5,000.00 (statutory under 18 USC 922(g)(1)), or $250,000.00 (alternative under 18 USC 3571(b)(3)), and a $50.00 mandatory assessment. It is understood that, in the event Mr. Jones is incarcerated, he may be required by the Court to pay the costs of his incarceration. In addition, the defendant understands that the Court will impose a special assessment of $50.00 for each felony conviction, and the defendant agrees the special assessment will be paid in full by certified check or money order and made payable to the United States District Court prior to the sentencing hearing.

3. Mr. Jones will be completely forthright and truthful with federal officials in the Northern District of West Virginia with regard to all inquiries made of him and will give signed, sworn statements and Grand Jury and trial testimony relative thereto. Mr. Jones will agree to submit to a polygraph examination if requested to do so by the United States Attorney's Office for the Northern District of West Virginia.

4. Nothing contained in any statement, or any testimony given by Mr. Jones pursuant to paragraph 3 herein will be used against him in any further criminal proceedings. However, this agreement does not prevent Mr. Jones from being prosecuted for any violations of other federal or state laws Mr. Jones may have committed should evidence of any such violations be obtained from an independent and legitimate source separate and apart from that information and testimony being provided by Mr. Jones pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Jones for perjury or the giving of a false statement to a federal agent, if such situation should occur by virtue of his fulfilling the conditions of paragraph 3 above.

5. At final disposition, the United States will advise the Court of Mr. Jones' forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give the same such weight as the Court deems appropriate. In addition, the United States will move to dismiss the remaining Count pending against Mr. Jones in Indictment No. 92-00046 now pending against the defendant in the Northern District of West Virginia. It is further understood that the United States Attorney's Office for the Southern District of West Virginia has agreed to dismiss all four (4) counts of Indictment No. 2:92-00186 now pending against the defendant in the United States District Court for the Southern District of West Virginia.

6. There have been no representations whatsoever by any agent or employee of the United States, or any other agency, as to what the final disposition in this matter should and will be. This agreement includes a *non-binding* recommendation by the United States, pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. However, Mr. Jones understands that the Court is *not* bound by this sentence recommendation and that Mr. Jones has *no* right to withdraw a guilty plea if the Court does not follow the sentencing recommendation set forth in this plea agreement.

7. The United States will make the following *non-binding*

a. The United States will recommend that the Court credit the defendant with a reduction of two levels below the otherwise applicable guideline range for "acceptance of responsibility" as provided by Guideline 3E1.1.

8. If in the opinion of the United States, the defendant either engages in conduct defined under the Application Notes 1(a) through (e) of Guideline 3C1.1, fails to cooperate as promised, fails to tender for payment the special assessment prior to the sentencing hearing, or violates any other provision of this plea agreement, then the United

States will not be bound to make the foregoing recommendation, and the defendant will not have the right to withdraw the plea.

9. It is further understood that, by entering into this agreement, defendant is not waiving his right to file a Writ of Certiorari to the United States Supreme Court requesting that the Supreme Court overrule the decision of the United States Court of Appeals for the Fourth Circuit in Case No. 92-5820, *United States v. Kirby Lee Jones*.

10. The United States reserves the right to provide to the Court and the United States Probation Office, in connection with any presentence investigation that may be ordered pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, or in connection with the imposition of sentence should the Court, pursuant to Rule 32(c)(1), not order a presentence investigation, relevant information including Mr. Jones' background, criminal record, offense charged in the Indictment, and other pertinent data appearing at Rule 32(c)(2) of the Federal Rules of Criminal Procedure as will enable the Court to exercise its sentencing discretion. The United States also retains the right to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the anticipated presentence report to be prepared by the Probation Office of this Court, and to respond to any written or oral statements made to the Court by Mr. Jones or his counsel.

11. If Mr. Jones' plea is not accepted by the Court or is later set aside or if Mr. Jones breaches any part of this agreement, then the Office of the United States Attorney will have the right to void this agreement.

12. The above eleven (11) paragraphs constitute the entire agreement between Mr. Jones and the United States. There are no other agreements, understandings, or promises between the parties other than those contained in this agreement.

Very truly yours,
WILLIAM D. WILMOTH
United States Attorney

By: /s/ Lisa A. Grimes
LISA A. GRIMES
Assistant United States Attorney

LAG/djb

As evidenced by my signature at the bottom of the four (4) pages of this letter agreement, I have read and understand the provision of each paragraph herein and fully approve of each provision.

/s/ Kirby Lee Jones July 12, 1993
KIRBY LEE JONES

/s/ R. Russell Stobbs July 12, 1993
R. RUSSELL STOBBS
Counsel for Kirby Lee Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

Criminal No. 92-46

UNITED STATES OF AMERICA,
Plaintiff,

v.

KIRBY LEE JONES,
Defendant.

ORDER

Filed Jul. 22, 1993

The Court has received a copy of a plea agreement in the above-styled criminal action wherein it is indicated that the defendant will enter a plea of guilty to Count One of the Indictment. Inasmuch as Paragraph Nine of the plea agreement reflects that the defendant will file a Petition for a Writ of Certiorari to the United States Supreme Court, it is

ORDERED that further action in this matter and consideration of the plea agreement shall be held in abeyance until the defendant's appeal is exhausted. It is further

ORDERED that the period of delay resulting from the appeal and from the Court's consideration of the issues raised and suggested by the said plea agreement shall be excluded in computing the time within which the trial of the offense charged in the above-styled criminal action

must commence in accordance with the provisions of 18 U.S.C. § 3161(h)(1)(E) an (I).

Enter: July 22nd, 1993.

/s/ Robert E. Maxwell
United States District Judge

/s/ Deputy Clerk

(5)

FILED
JAN 5 1994
OFFICE OF THE CLERK

No. 93-445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LENARD RAY BEECHAM
and
KIRBY LEE JONES,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a person with a federal felony conviction who has had his civil rights restored under state law is deemed a felon under 18 U.S.C. § 921(a)(20), which removes the firearms ineligibility for any person who "has had civil rights restored."

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

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and

KIRBY LEE JONES,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *United States v. Beecham* (Pet. App. 1a-9a) is unreported. The opinion of the court of appeals in *United States v. Jones* (Pet. App. 10a-22a) is reported at 993 F.2d 1131. The opinions of the magistrate judge in the *Jones* case (Pet. App. 25a-30a) and of the district court in the *Beecham* case (J.A. 10-16) are unreported.

JURISDICTION

The decision of the court of appeals in the *Beecham* case was rendered on June 2, 1993. A timely petition for

rehearing and suggestion for rehearing *en banc* was denied on June 29, 1993. The decision of the court of appeals in the *Jones* case was rendered on May 24, 1993. The petition for a writ of certiorari was filed with respect to both the *Beecham* and *Jones* decisions under Rule 12.2 of the Rules of this Court on September 20, 1993. This Court granted certiorari on November 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 922(g) of Title 18 provides, in relevant part:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. Section 921(a)(20) of Title 18 provides as follows:

> (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses, relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

3. Section 925(c) of Title 18 provides, in relevant part:

> (c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial.

STATEMENT

1. *The Statutory Framework*

Federal law has restricted receipt of certain firearms by defined categories of felons since the Federal Firearms Act of 1938. 52 Stat. 1250 (1938). The Gun Control Act of 1968 (82 Stat. 1213 (1968)), as amended by the Firearms Owners' Protection Act (100 Stat. 449 (1986)), enumerates seven classes of persons whose receipt or possession of firearms constitutes a criminal offense punishable under 18 U.S.C. § 922(g) by up to 10

years in jail (18 U.S.C. § 924(a)(1)) and a $250,000 fine (18 U.S.C. § 3571(b)(3)).

Congress passed the Firearms Owners' Protection Act (100 Stat. 449 (1986)) in April 1986. Section 101 of that Act amended 18 U.S.C. § 921(a)(20), which defines a "conviction" for purposes of the criminal prohibition of Section 922(g). These two cases, consolidated for review by this Court pursuant to Rule 12.2, concern the meaning of the 1986 provision that directs that "[a]ny conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction for purposes of this chapter."

The statutory reference to "restoration" of civil rights relates to state laws suspending or forfeiting enumerated civil rights of convicted felons. Florida law, for example, provides (Fla. Stat. Ann. § 944.292 (West 1985)):

> Upon conviction of a felony as defined in s. 10, Art X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.

The "civil rights" forfeited or suspended under such laws vary from State to State. In most jurisdictions, they include the rights to vote, hold public office, and serve on a jury. For example, Ohio Rev. Code Ann. § 2961.01 (Anderson 1993) declares:

> A person convicted of a felony under the laws of this or any other state or the United States, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust or profit . . . .

Some jurisdictions extend the loss of civil rights to "private trusts, authority and power." Idaho Code Ann. § 18-310(1) (1949 & Supp. 1993); New York Civ. Rights Law § 79(1) (McKinney 1992). Others preclude felons from serving as police officers (Mass. Ann. Laws ch. 41, § 96A (Law. Co-op. 1993)); peace officers (Cal. Gov't Code § 1029 (Deering 1993)); or sheriffs (Or. Rev. Stat. § 206.015 (1991)). Convicted felons are also prevented in some states from serving in a fiduciary capacity, such as executor, administrator, guardian or trustee. Ala. Code §43-2-22 (1975); Wash. Rev. Code Ann. §§ 11.36.010, 11.36.021 & 11.88.020 (West 1987 & Supp. 1993). Appendix A to this brief lists and categorizes various loss-of-rights provisions provided by State laws.

Some state forfeiture-of-rights statutes, such as the Ohio provision previously quoted, refer explicitly to federal convictions. Others include federal convictions by broad encompassing language. We know of no jurisdiction that specifically—by statutory language or judicial decision—cludes federal convictions from a forfeiture-of-civil-rights provision.

State statutes typically provide for restoration of rights in the event of expungement, pardon, or like events that effectively negate the original conviction. Many States also provide that rights may be restored through procedures that do not affect or call into question the original conviction.

State laws vary in their procedures for restoration of rights. Some require application to a court or specified state agency for such relief. *E.g.*, Ariz. Rev. Stat. Ann. § 13-910(B) (1989) (providing that person discharged from federal prison may, after two years from the date of discharge, apply for restoration of civil rights with the clerk of the superior court in the county where the person lives). Others provide that a restoration of rights automatically follows on completion of the full term of a sentence, usually including period of probation or parole. See, *e.g.*, Mont. Code Ann. § 46-18-801(3) (1993) (restoring "all civil rights and full citizenship, the same as if such conviction had not occurred," on expiration of sentence).

Under some statutory procedures, the felon receives a certificate or other formal declaration that his or her rights have been restored. *E.g.*, N.H. Rev. Stat. Ann. § 607-A:5 (1991). In other jurisdictions, the restoration is effective automatically, and there is no formal or written attestation regarding its effect. See, *e.g.*, Idaho Code § 18-310 (2) (1949 & Supp. 1993). Appendix B to this brief lists and categorizes the various restoration-of-rights provisions of State laws.

Although there are many specific provisions of state law dealing with the legal disability to own or possess a firearm (see, *e.g.*, N.J. Rev. Stat. § 2C:39-7 (1982)) and state law provisions that deal specifically with the restoration of the right to possess firearms (see, *e.g.*, Mich. Comp. Laws Ann. § 28.424(1) (West Supp. 1993)), the two cases before this Court do not concern those limited statutes. Both cases involve defendants who were convicted in federal courts and thereafter had civil rights restored *generally* pursuant to the state law of the jurisdiction where they resided.

2. *The Beecham Case*

Lenard Ray Beecham was convicted in 1979 in the United States District Court for the Western District of Tennessee of violating 18 U.S.C. § 922(h), the felon-in-possession provision of the Gun Control Act of 1968. Pet. App. 3a; J.A. 11. Following his release, Beecham moved to Raleigh, North Carolina, where he purchased a used automobile dealership in Raleigh. *Id.*

Between November 1990 and March 1991, Beecham purchased or sold four firearms. He bought a pistol that he later sold to his business partner, a shotgun that he also sold to his partner, and a shotgun that he bought from a licensed firearms dealer. Related to this latter purchase, Beecham completed the required Bureau of Alcohol, Tobacco and Firearms ("BATF") form, and answered "no" to the question asking whether he had been

convicted of a felony. In February 1991, Beecham bought a pistol as part of the sale of an automobile, and, a few weeks later, he sold a revolver to a BATF agent posing as a customer at his dealership. Pet. App. 4a.

In March 1991, BATF agents executed search warrants at the dealership and at Beecham's home. These searches produced evidence that he possessed several additional firearms. In October 1991, Beecham was indicted in the United States District Court for the Eastern District of North Carolina on five counts of possessing a firearm in violation of 18 U.S.C. § 922(g)(1), five counts of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A), and one count of making a false statement in connection with the purchase of a firearm in violation of 18 U.S.C. § 922(a)(6). J.A. 5-9. Following a jury trial, Beecham was convicted on all counts. Pet. App. 4a-5a.

Beecham moved after the verdict for a judgment of acquittal on the felon-in-possession and false-statement counts. The district court granted the motion on the ground that the government had failed to prove that Beecham had a "conviction" within the meaning of 18 U.S.C. § 922(g). The district court rested this conclusion on its holding that, under Tennessee law, Beecham qualified for restoration of his civil rights. J.A. 14-15.

The government appealed, and the Court of Appeals for the Fourth Circuit reversed. The court of appeals held that in light of its very recent decision in *United States v. Jones*, Tennessee's restoration-of-rights law did not erase the disabling effects of the federal conviction under Section 921(a)(20). Pet. App. 5a. The case was remanded for resentencing. *Id.* at 9a.

On October 26, 1993, while his petition for a writ of certiorari was pending in this Court, the district court sentenced Beecham to an additional three months' imprisonment for the felon-in-possession and false-statement convictions. J.A. 3. The district court refused to release

Beecham pending this Court's decision, but the court of appeals ordered his release. J.A. 18.

3. *The Jones Case*

Kirby Lee Jones was convicted in 1971 in the United States District Court for the Southern District of Ohio of transporting a stolen vehicle across state lines. J.A. 19-20. He was also convicted in West Virginia state courts of offenses in 1969 and 1978. *Id.* In May 1982 he received a certificate from the Department of Corrections of the State of West Virginia entitled "Official Certificate of Discharge," which restored his civil rights. J.A. 22. In March 1992 Jones was indicted in the Northern District of West Virginia on one count of violating 18 U.S.C. § 922(g)(1) and one count of making a false statement in connection with the purchase of a firearm in violation of 18 U.S.C. § 922(a)(6). J.A. 19-21.

Jones moved to dismiss both counts of the indictment on the ground that in 1982 the civil rights he lost because of the state and federal felony convictions had been restored. A United States Magistrate Judge recommended that the motion to dismiss be granted (Pet. App. 25a-30a), and the district court adopted the recommendation and dismissed the indictment. J.A. 23-24.

On the government's appeal the Court of Appeals for the Fourth Circuit reversed. It acknowledged that both the Eighth and Ninth Circuits had held that a restoration of civil rights under state law erases a prior federal conviction under Section 921(a)(20). The court disagreed with these Circuits, however, and concluded "that Congress intended for a state's post-conviction restoration scheme to affect only the rights of persons convicted in that state's courts." Pet. App. 22a. The case was remanded for further proceedings. Jones then signed a conditional plea agreement, reserving his right to seek review of the court of appeals' decision. J.A. 26-30. The district court stayed entry of the plea pending the filing

of a petition for a writ of certiorari and this Court's decision. J.A. 31-32.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1986 Congress enacted and the President signed the Firearm Owners' Protection Act ("FOPA"), which, *inter alia*, overruled a number of decisions of this Court construing FOPA's predecessor—the Gun Control Act of 1968. At issue in this case is the meaning of Section 101 of FOPA, the "primary impetus" of which, according to the court below, was "to reverse the ruling of the Supreme Court in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983)." Pet. App. 18a-19a. See generally Hardy, *The Firearm Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585 (1987).

In *Dickerson*, this Court ruled 5-to-4 that the then-existing federal statutory prohibition against possession of firearms by a person convicted of a felony applied to someone whose state conviction had been expunged under state law. The Court's decision rested on two discrete legal conclusions: *First*, that the defiintion of "conviction" under the federal gun control statutes is "a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State." 460 U.S. at 111-12. *Second*, that "expunction under state law does not alter the historical fact of the conviction, and does not open the way to a license. . . ." *Id.* at 115.

In the two sentences added in 1986 that now comprise the concluding language of 18 U.S.C. § 921(a)(20) Congress expressed its disagreement with *both* of the Court's conclusions in *Dickerson*. The first sentence declares that "conviction" is to be defined by "the law of the jurisdiction in which the proceedings were held." The second sentence prescribes that certain "convictions" are not to be deemed disabling under federal law. In this second

sentence Congress added to the precise situation presented in *Dickerson*—"any conviction which has been expunged" —three other categories of "convictions" that "shall not be considered a conviction for purposes of this chapter." These are (1) any conviction that "has been . . . set aside," (2) any conviction "for which a person has been pardoned," and (3) any conviction "for which a person . . . has had civil rights restored."

Both petitioners have been "convicted" under federal law, and we acknowledge that the predicate convictions resulting in their indictment under 18 U.S.C. § 922(g)(1) (J.A. 5, 6, 7, 8-9, 19-20) do, in fact, qualify as "convictions" under the law of the rendering jurisdictions and hence constitute "convictions" under the first sentence of the 1986 amendment. The legal question requiring resolution by this Court is whether those convictions are, pursuant to the concluding sentence of the 1986 amendment, not to be considered convictions under the federal gun control laws because both petitioners had civil rights that were lost to them because of the federal convictions "restored" by operation of state law.

Our argument that the petitioners' federal convictions do not, in light of the subsequent restoration of their civil rights, disable them from possessing firearms proceeds along three lines. *First*, we contend that the "plain meaning" approach that this Court has long taken to issues of statutory construction compels reversal of the rulings of the Fourth Circuit in these cases and acceptance of the contrary holdings of the Eighth and Ninth Circuits. More specifically, we note that the government's proposed construction of Section 921(a)(20) inserts an unexpressed distinction into that statute—*i.e.*, a difference between state convictions and federal convictions. Decisions of this Court, rendered with opinions written by various Justices, firmly establish the rule of statutory construction that no unexpressed limitation will be read into statutory language that is clear and unqualified on its face. This

is a rule that has been applied recently by this Court in both criminal and civil cases, and that has particularly governed decisions involving the federal firearms laws. Indeed, the rationale that produced the decision in *Lewis v. United States*, 445 U.S. 55 (1980), requires reversal of the decision of the Fourth Circuit.

Second, we discuss the legislative history of the 1986 amendments and demonstrate that it does not show a "clearly expressed legislative intention" to qualify, in any way, the plain meaning of the words Congress chose. The legislative history lacks any material that could support the construction given to Section 921(a)(20) by the government and the court below. Moreover, contrary to the result urged by the government, there are sound policy reasons to interpret the statute so as to afford *less* opportunity for state felons to possess firearms than for federal felons. In any event, amendment of the statute, if it is desirable policy, must be left to the Congress.

Third, we call attention to the "rule of lenity" that governs the construction of federal criminal statutes. In this situation, the statutory language does not support the more harsh reading of the law; that result can be achieved only by stretching the words of the law and reading in an implied distinction between federal and state convictions. It would be exceedingly unfair to defendants, who have no warning from the face of the statute that it should be read in this manner, to apply the law against them.

ARGUMENT

I. THE PLAIN MEANING OF CONGRESS' 1986 AMENDMENT TO SECTION 921(a)(20) IS THAT BOTH FEDERAL AND STATE CONVICTIONS SHALL "NOT BE CONSIDERED" DISABLING IF THE DEFENDANT'S CIVIL RIGHTS HAVE BEEN "RESTORED" BY ANY APPLICABLE LAW

The statutory language that Congress used to overrule this Court's *Dickerson* decision and that controls this case is not complex or convoluted. It declares, in straightforward terms, that "[a]ny conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction for purposes of this chapter . . . ."

Congress referred explicitly to "Federal" and "State" laws in subsections (A) and (B) of Section 921(a)(20), thereby demonstrating that it was not oblivious to the different jurisdictions that could affect an individual's rights. But the last sentence of Section 921(a)(20) does not include the words "Federal" or "State." It speaks broadly of "any" conviction and does not limit the jurisdictions that may grant the restoration of rights that removes a felon's ineligibility. The last sentence of Section 921(a)(20) on its face draws no distinction between federal and state convictions or between federal and state restorations of civil rights.

To sustain the government's position in these cases, a court must read into the statute a limitation or qualification that is not expressed in the statutory language. In substance, the government and the court below maintain that the statute should be read as if its text were "Any *state* conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction for purposes of this chapter." Or, alternatively, they construe the statute as if it read: "Any conviction . . . for which a person . . . has had civil rights restored *by the convicting jurisdiction* shall not be considered a conviction for purposes of this chapter." These implied additions to the statutory language are not permissible under the principles of statutory construction that this Court traditionally applies.

The overriding principle of statutory construction was recently reaffirmed by this Court in its unanimous opinion in *Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993) (quoting from *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1992)): "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." The Court, speaking through Justice Kennedy, expressed the same principle in slightly different words in *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992): "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." And in *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992), the Court, speaking through Justice Thomas, said: "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " (Citations omitted.) See also *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (O'Connor, J.) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." (Citations omitted.)); *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2636 (1991) (Blackmun, J.) ("When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances.")

When they considered the issue now facing this Court, the Courts of Appeals for the Eighth and Ninth Circuits concluded that the plain meaning of the concluding sentence of 18 U.S.C. § 921(a)(20) erases the firearms disability of a federal conviction for which an individual has received a restoration of rights under state law. In *United States v. Geyler*, 932 F.2d 1330, 1334 (9th Cir. 1991), the Ninth Circuit said (emphasis original):

> In this case, the meaning of the statutory language is clear. "*Any conviction* . . . for which a person . . . has had civil rights restored" means precisely that. Pursuant to the plain language of § 921(a)(20), a state's restoration of civil rights to a person eliminates the underlying conviction as a predicate offense for purposes of the federal firearms laws, whether the conviction was for a state or federal offense.

And in *United States v. Edwards*, 946 F.2d 1347, 1349 (8th Cir. 1991), a unanimous Eighth Circuit panel said (citation omitted):

> [W]hen the statutory language is clear, we ordinarily need not consult the legislative history. In this case, the statute is unambiguous and the legislative history does not reveal any "clearly expressed legislative intention" contradicting the statutory language; thus, we have no warrant to apply legislative history to vary the plain statutory language.

Only the Fourth Circuit has concluded that the language of the 1986 amendment is not "plain." See Pet. App. 16a-17a. Through strained and untenable reasoning the court rejected the meaning that clearly emerges from the text of the statute (see Pet. App. 16a). See pp. 23-25, *infra*. The Fourth Circuit said that the "plain language" approach of the Eighth and Ninth Circuits "misses the forest for the trees." Pet. App. 17a. The Fourth Circuit, we submit, has lost its way in a forest that it alone perceives.

A. No Implied Distinction Between State and Federal Convictions Should Be Read Into the Last Sentence of Section 921(a)(20).

The government and the court below maintain that an implied exception should be read into the concluding sentence of Section 921(a)(20). They acknowledge that someone who has been convicted of a state felony is not disabled under the federal gun laws from possessing a firearm if his or her civil rights have been restored by operation of state law. See, *e.g.*, *Bell v. United States*, 970 F.2d 428 (8th Cir. 1992); *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992); *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991); *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991); *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991); *United States v. Gomez*, 911 F.2d 219 (9th Cir. 1990); *United States v. Cassidy*, 899 F. 2d 543 (6th Cir. 1990). They contend, however, that although the words of the statute make no distinction between federal and state convictions, a different rule applies if the predicate conviction is a federal one. This manner of reading a statute—*i.e.*, inserting a qualification that the statute does not explicitly draw—conflicts with the rationale of many recent decisions of this Court, in both criminal and civil contexts, that have resolved issues of statutory construction. And, in particular, it conflicts with the approach that this Court has taken to the language of the federal firearms laws.

(1) *The Most Recent Precedent*—We begin with a very recent precedent, *Smith v. United States*, 113 S. Ct. 2050 (1993). *Smith* was a criminal case in which a question of statutory construction was decided contrary to the theory of statutory interpretation that the government is proposing in this case. This Court held in *Smith* that an accused who traded a machine gun for cocaine could be prosecuted for "using" a firearm while committing a drug trafficking offense. In an opinion by Justice O'Connor, the Court held that the statutory term "use" did not mean

"use as a weapon" because "the words 'as a weapon' appear nowhere in the statute." 113 S. Ct. at 2054. In an observation that applies fully to this case (with the words "the government" substituted for "petitioner"), the Court said, "Had Congress intended the narrow construction petitioner urges, it could have so indicated. It did not, and we decline to introduce that additional requirement on our own." *Id.*

By the same token, Congress could have written the word "state" or the words "by the convicting jurisdiction" into the last sentence of Section 921(a)(20) (see pp. 12-13, *supra*) if it had wished not merely to overrule *Dickerson* but to create a distinction between federal and state convictions in the area of restoration of rights. Congress chose not to do so, and, consistently with the principles of its recent *Smith* decision, this Court should decline to "introduce that additional" qualification on its own.

(2) *Other Recent Rulings*—On many occasions during the past decade this Court has rejected proposed statutory interpretations that depend on the same kind of argument that the government is making here—*i.e.*, the contention that the language used by Congress should be modified by a qualification or condition that Congress failed to state explicitly. The Court has repeatedly turned aside such arguments.

(a) *Union Bank v. Wolas*, 112 S. Ct. 527 (1991)—Because of a 1984 amendment to the Bankruptcy Code, payment on long-term debt made within 90 days of bankruptcy qualified, under the statutory language, as a non-voidable transfer. The bankrupt's creditors presented persuasive reasons why permitting such payments would violate the basic bankruptcy policy of equitable distribution of an estate among the bankrupt's creditors. They claimed that Congress had inadvertently eliminated the statutory language that would have made payments on long-term debt voidable. This Court, in a unanimous opinion by Justice Stevens, refused to read into the

amendment an implied exception for long-term debt (analogous to the implied exception for federal convictions that the government is urging). It relied on "the statutory text—which makes no distinction between short-term debt and long-term debt." 112 S. Ct. at 533. By the same token, Section 921(a)(20) "makes no distinction" between federal and state convictions or between federal and state restoration of rights.

(b) *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991)—The Tax Reform Acts of 1984 and 1986 authorized the chief judge of the Tax Court to appoint a "special trial judge" for certain designated cases and for "any other proceeding." The petitioner in *Freytag* maintained that this seemingly broad authorization was actually meant by Congress to cover only "comparatively narrow and minor matters" (analogous to the implied limitation to state convictions that the government reads into Section 921(a)(20)). Speaking for a unanimous Court on the applicable rule of statutory construction, Justice Blackmun said that the statutory language was unambiguous and that courts were not at liberty to create any exception that Congress had declined to write. 111 S. Ct. at 2636.

(c) *Toibb v. Radloff*, 111 S. Ct. 2197 (1991)—Some courts had "engrafted an ongoing business requirement onto" the provision of the Bankruptcy Code that defines the class of persons eligible for reorganization under Chapter 11. 111 S. Ct. at 2200. This Court, speaking through Justice Blackmun, held that "the plain language of the Bankruptcy Code disposes of the question. . . ." 111 S. Ct. at 2199. The Court reviewed the law's legislative history and policy only after noting that there was "no need to do so" because the language of the statute was clear. *Id.* at 2200.

(d) *Norfolk & Western Ry. v. American Train Dispatchers*, 111 S. Ct. 1156 (1991)—The Interstate Commerce Act exempts rail-carrier consolidations approved by

the Interstate Commerce Commission "from all other law." A court of appeals read this exemption as inapplicable to contract liability (analogous to the Fourth Circuit's implied exception in this case for federal convictions), and accordingly held that a collective-bargaining agreement was not exempted by the ICC's approval. This Court, per Justice Kennedy, reversed on the ground that the statutory language "is clear, broad, and unqualified," and that it did not, therefore, "admit of the distinction the Court of Appeals drew, based on its analysis of legislative history, between positive enactments and common-law rules of liability." 111 S. Ct. at 1163. Similarly, the language of Section 921(a)(20) does not "admit of the distinction the Court of Appeals drew" between federal and state convictions.

(e) *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990)--The issue before the Court was whether restitution obligations that are conditions of probation in state criminal proceedings are dischargeable "debts" under the Bankruptcy Code. The United States and virtually all State Attorneys General argued that the word "debts" as used in the Code should be read to except criminal restitution orders by implication (analogous to the government's argument in this case that an implied exception for federal convictions should be read into Section 921(a)(20)). In an opinion by Justice Marshall, this Court rejected the argument and concluded that "our sole function is to enforce the statute according to its terms." 495 U.S. at 564.

(f) *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989)—Although the Bankruptcy Code generally authorizes payment of "interest" to the holder of an oversecured claim, a court of appeals qualified that statutory term by allowing post-petition interest only for voluntary or consensual liens (analogous to qualifying the restoration-of-rights provision in Section 921(a)(20) by limiting it to state convictions only). This Court, in an opinion by Justice Blackmun, rejected the implied limitation

with the observation that "[t]he language before us expresses Congress' intent—that postpetition interest be available—with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary." 489 U.S. at 241.

(g) *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)—The United States argued to this Court that the federal law authorizing asylum for a refugee who cannot return to his country because of "persecution or well-founded fear of persecution" implicitly incorporated the objective test of "clear probability of persecution" that applies elsewhere in the immigration laws (analogous to the argument that the restoration-of-rights clause of Section 921(a)(20) implicitly incorporates an exception for federal convictions). In an opinion by Justice Stevens, this Court rejected that qualification as inconsistent with "[t]he ordinary and obvious meaning of the phrase" used by Congress and with "the plain language of the Act." 480 U.S. at 431, 432.

(h) *Park 'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985)—A court of appeals interpreted the Lanham Act's protection for incontestable federally registered trademarks as impliedly excluding those that are merely descriptive and are invoked offensively to enjoin others' use of the same descriptive mark. (This holding was analogous to the Fourth Circuit's conclusion that Section 921(a)(20) is impliedly inapplicable to federal convictions subject to state restorations of rights.) This Court, in an opinion by Justice O'Connor, said, "One searches the language of the Lanham Act in vain to find any support for the offensive/defensive distinction applied by the Court of Appeals. The statute nowhere distinguishes between a registrant's offensive and defensive use of an incontestable mark." 469 U.S. at 196. The Court also rejected, on grounds of the "plain language" of the Lanham Act, any claim that a descriptive mark may not qualify as incontestable. *Id.* at 196, 197. The same reasoning requires rejection of the government's

proposed federal/state distinction in this case because one searches Section 921(a)(20) "in vain" for such a distinction, and the distinction is inconsistent with the statute's plain language.

(i) *North Dakota v. United States,* 460 U.S 300 (1983)—The Wetlands Act of 1961 authorized the federal government to purchase land for waterfowl habitats if the governor of the state in which the land is located "has . . . approved." North Dakota claimed that the statutory language was qualified by an implied exception if the approval has been withdrawn before acquisition (analogous to the implied exception for federal convictions urged by the government in this case). In an opinion by Justice Blackmun, this Court noted that the statutory language is "uncomplicated" and that "[n]othing in the statute authorizes the withdrawal of approval previously given." 460 U.S. at 312, 313. Nothing in Section 921 (a)(20) authorizes withholding the relief from disabilities granted by that section to someone whose rights have been restored by state law after a federal conviction.

The nine decisions summarized above are all instances in which this Court, speaking through different Justices, has rejected claims that the plain meaning of the words Congress has chosen should be qualified by some condition that a party believes is supported by legislative history or sound reasons of policy. The same approach to statutory construction taken in these nine cases requires rejection of the position taken in the two cases before the Court by the government and by the Fourth Circuit.

(3) *Federal Firearms Cases*—The history of this Court's decisions construing the federal firearms laws confirms the lessons of the cases previously described. The Court has consistently refused to read unexpressed qualifications into the provisions of the Gun Control Act of 1968. It has applied the statutory provisions literally, even if the results in individual cases have seemed extraordinarily harsh.

In each of these instances, to be sure, the literal application of the statutory language has favored the government and has restricted the freedom to possess firearms. But the same principles of statutory construction must apply if the outcome favors gun-holders as would apply if the outcome limits their rights. Neutral principles invoked by this Court in the federal firearms precedents require reversal of the Fourth Circuit's judgments.

(a) *Huddleston v. United States,* 415 U.S. 814 (1974) —In ruling, on behalf of eight Justices of the Court, that redemption of a firearm from a pawnshop amounted to "acquisition" of the firearm within the meaning of the Gun Control Act, Justice Blackmun refused to read the term "acquisition" in any qualified way. He noted that if Congress had intended to exempt redemptive transactions from the reach of the statute, "it would have artfully worded the definition so as to exclude it." 415 U.S. at 822. The Court found "no grievous ambiguity or uncertainty in the language and structure of the Act." 415 U.S. at 831. By the same token, there is "no grievous ambiguity or uncertainty" in the concluding sentence of Section 921(a)(20).

(b) *Barrett v. United States,* 423 U.S. 212 (1976)— The language of the Gun Control Act of 1968 made it a criminal offense for convicted felons to receive any firearm "which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(h). Consequently, the Court held that an accused whose own transaction was entirely intrastate could be convicted if the gun he possessed had reached the dealer through interstate channels. Justice Blackmun's opinion for the Court majority concluded that the unambiguous language of the law, which contained "no limitation to a receipt which itself is part of the interstate movement" (423 U.S. at 216), compelled the result reached by the Court—notwithstanding dictum in a previous decision of this Court and contrary indications in the legislative history. See Stewart, J., dissenting, 423 U.S. at 228-31.

(c) *Lewis v. United States*, 445 U.S. 55 (1980)—Most notably, this Court's rationale in *Lewis* cannot be reconciled with the government's proposed reading of Section 921(a)(20). The issue in *Lewis* was whether the firearms ineligibility then prescribed by Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (repealed in 1986 by the FOPA) included felony convictions that were vulnerable to collateral attack under *Gideon v. Wainwright*, 372 U.S. 335 (1963), because the accused was unrepresented by counsel. The statutory language declared that "any person . . . convicted . . . of a felony" was ineligible, and the petitioner argued that an exception should be read into the law for a felony conviction subject to collateral attack. Justice Blackmun's opinion rejecting the implied exception observed that the statute was "directed unambiguously" at anyone who had been convicted, that "[n]o modifier is present, and nothing suggests any restriction on the scope of the term 'convicted,'" and that "[t]he statutory language is sweeping, and its plain meaning" supports a broad reading of the term. 445 U.S. at 60.

All these characteristics appear in the language of Section 921(a)(20). The statute contains no "modifier" of the word "conviction" or of the restoration-of-rights provision. Nothing on the face of the statute limits it to state convictions or restoration of civil rights by the same jurisdiction that generated the conviction. The "sweeping" language—"any conviction" and "had civil rights restored"—and the "plain meaning" of the law both support the conclusion that the statutory provision is unqualified.

In its *Lewis* opinion, the Court also relied on the fact that the statute enumerated exceptions but did not specify the exception that the petitioner was urging. The same is true in these cases. Section 921(a)(20) exempts any restoration of civil rights that "expressly provides that the person may not ship, transport, possess, or receive firearms." While excepting such a limited restoration of rights, Congress did *not* except a state restoration of

rights for a federal offense—an exception that Congress could easily have provided.

(d) *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983)—This Court again refused to read into the Gun Control Act any implied limitation when it held that an expunged conviction was, nonetheless, a disabling conviction for purposes of the federal firearms laws. The Court, per Justice Blackmun, held that "[s]o far as the face of the statute is concerned . . . expunction under state law does not alter the historical fact of the conviction, and does not open the way to a license despite the conviction. . . ." 460 U.S. at 114-15. The same reasoning—*i.e.*, reliance on the "face of the statute"—supports our reading of Section 921(a)(20), not the government's.

B. The Plain Meaning of the Last Sentence of Section 921(a)(20) Is That Petitioners' Federal Convictions Should Not Be Considered in Determining Their Eligibility To Possess Firearms.

The court of appeals concluded that the "plain meaning analysis" was "compromised" in these cases because a court would have to "stray[] outside the text of the statute" to apply it to the petitioners. See Pet. App. 17a. The court's reasoning is puzzling, and its conclusion is plainly erroneous.

The court said that "restoration of civil rights" is a term that "can admit of several legitimate interpretations." Pet. App. 16a. It maintained that the federal procedure provided in 18 U.S.C. § 925(c) for application to the Secretary of Treasury for relief from firearms disabilities satisfies this definition. The Court also said that more active conduct by state officials than mere restoration by operation of law might be a requirement of Section 921(a)(20). See Pet. App. 16a-17a.

Even if these are possible interpretations of the statute, they do not obviate the fact that the law, by its plain terms, directs that "any conviction" is not to be consid-

ered if the defendant "has had civil rights restored"—presumably in any manner or by any jurisdiction. The specific restorations of rights that the court of appeals describes are not the *only* restorations of rights that the statute contemplates. On this point, the plain meaning of the law is clear. It covers every person who "has had civil rights restored"—not merely those whose firearms disabilities have been relieved under 18 U.S.C. § 925(c) or by some active formal state certification, finding or declaration.

Moreover, the relief provided by 18 U.S.C. § 925(c) is not truly a "restoration of civil rights." It is, rather, a means by which the federal statutory disability governing firearms ownership or possession may be removed. A considerable number of States have provisions of local law similar to Section 925(c), in addition to provisions that generally "restore civil rights." Consequently, to read 18 U.S.C. § 925(c) as a federal restoration-of-rights law does not square with its language or with its commonly accepted description. In fact, there is no federal statute that restores civil rights lost by a federal felon. It makes good sense, therefore, to read the concluding sentence of Section 921(a)(20) as a reference to *state* restoration-of-rights laws.

Nor was the Fourth Circuit correct in assuming that special "congressional knowledge" on any subject was required for the Eighth and Ninth Circuits to apply the plain meaning of the law to the individuals in the cases before them. Pet. App. 16A-17A. Both of these courts of appeals looked first to the plain language of the law. In their opinions, they also went beyond the language and tried to discern the probable intent of Congress. In this regard they considered whether there exists any federal restoration-of-rights law apart from the process described in 18 U.S.C. § 925(c). That inquiry—and the conclusion that there is no such federal law—did not mean that they were abandoning the plain meaning analysis or

diminishing the impact of the straightforward language of Section 921(a)(20).

C. The Plain Meaning of the Statute Is Unaffected by What This Court Believes Congress Should Have Done.

In this particular area of federal law, there is substantial public debate and sensitivity. Many believe that a federal law should limit, as much as possible, the number of individuals who may lawfully possess firearms. And there are, of course, legitimate policy reasons why Congress might choose to deny firearm ownership to persons who have been convicted of serious crimes, regardless of the treatment the law affords such individuals with respect to other civil rights.

In his dissent in *Barrett v. United States*, 423 U.S. 212, 228 (1976), Justice Stewart observed that the possession of a handgun by the petitioner in that case was "offensive to those who believe in law and order" and was "particularly offensive to those concerned with the need to control handguns." Nonetheless, he warned against a "rush to judgment" that would convict someone who was not truly within the reach of the federal criminal statute.

These cases present similar concerns. This Court may feel that control of firearms warrants the imposition of severe restrictions under federal law. Indeed, the Court may find it difficult to believe that the Congress that enacted the FOPA in 1986 would have permitted federal felons to possess firearms merely because they lived in States where their civil rights were restored. Nonetheless, the Court's duty is to enforce the law as written.

Justice Marshall's caution in *United States v. Locke*, 471 U.S. 84, 95-96 (1985), is applicable here (citations omitted):

> [T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to

> achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used."

What the government is requesting in these cases is a revision of the applicable statute, not a construction of ambiguous terms. Justice Brandeis rejected a similar government request with regard to a plain and unambiguous statute in *Iselin v. United States*, 270 U.S. 245, 250-51 (1926), quoted in *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 (1991):

> What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

See also *Union Bank v. Wolas*, 112 S. Ct. 527, 533 (1991) ("Whether Congress has wisely balanced the sometimes conflicting policies underlying § 547 is not a question that we are authorized to decide.")

In *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2598 (1992), Justice Kennedy concluded this Court's opinion with observations that apply fully to this case:

> Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Speaking for the Court, Justice Ginsburg recently made this precise point. Acknowledging that the United States had demonstrated "substantial concerns" supporting a proposed construction of a federal statute that was inconsistent with its language, Justice Ginsburg said that policy concerns cannot be given "dispositive weight" because "[t]he insurers' views have been presented to Congress and that body can adjust the statute." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 62 U.S.L.W. 4025, 4032 (U.S. Dec. 13, 1993) (footnote omitted).

D. The Penultimate Sentence of Section 921(a)(20) Does Not Affect the Plain Meaning of the Last Sentence.

We turn, finally, in considering the plain meaning of the 1986 amendment, to the argument that the government has made in the various courts of appeals and may be expected to make here. The government claims that the penultimate sentence of Section 921(a)(20) is a Congressional directive that, for purposes of the next sentence, only federal restoration of rights may negate federal convictions. This argument was rejected even by Circuit Judge Fletcher, who dissented from the Ninth Circuit's ruling in *United States v. Geyler*, 932 F.2d 1330, 1337 (9th Cir. 1991), although she accepted the proposition that the earlier sentence "must inform" the reading of the term "any conviction." Nor was it accepted by the Fourth Circuit, which supplied its own reasons for reading the final sentence of Section 921(a)(20) in a qualified manner.

The government's argument is unsound for two reasons. *First*, the language of the penultimate sentence does not support the meaning the government gives to it. That sentence directs how the Court is to determine "[w]hat constitutes a conviction." It is the next sentence, not the penultimate one, that describes when an acknowledged conviction is to "be considered a conviction for purposes of this chapter."

Second, it is clear, in the context of earlier federal firearms cases, that the earlier sentence is directed to the first of this Court's two holdings in *Dickerson*—*i.e.*, whether a particular court judgment is to be considered a "conviction" at all under the federal firearms laws. In *Dickerson*, all the Justices, including the four who dissented from the Court's reversal, agreed that federal law controlled the issue whether the state's judgment was a "conviction" for federal gun control purposes. 460 U.S. at 111-12 (majority opinion), 123 (dissent). Congress squarely overruled that unanimous ruling in the FOPA when it declared in the penultimate sentence that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921 (a)(20).

That Congressional directive did not, however, tell the courts what effect is to be given to a "conviction" that has been the subject of expunction, reversal, pardon, or restoration of rights. The concluding sentence of the 1986 amendment separately instructed how to deal with such subsequent events. The earlier sentence does not, therefore, control the sentence that follows it.

In *Negonsott v. Samuels*, 113 S. Ct. 1119 (1993), an argument similar to the government's was made and rejected by this Court. In that case, the petitioner argued that the second sentence of the Kansas Act deprived the State of Kansas of jurisdiction to try him under the Act's first sentence for offenses covered by the Indian Major

Crimes Act committed on an Indian reservation. This Court held that the unambiguous provision of the first sentence, which gave Kansas jurisdiction "to prosecute all offenses—major and minor—committed by or against Indians on Indian reservations in accordance with state law" (113 S. Ct. at 1123), was not limited by the second sentence. If the second sentence limited the first, said the Court, that result would "hardly be reconciled with the first sentence's unqualified grant of jurisdiction to Kansas to prosecute all state-law offenses committed by or against Indians on Indian reservations." *Id.*

By the same token, if the government's interpretation of the penultimate sentence of Section 921(a)(20) were accepted, it could not be reconciled with the unqualified terms of the second sentence. Neither its language nor its context supports the government's position.

II. THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS IS SILENT ON THE ISSUE AND FAILS TO ESTABLISH ANY "CLEARLY EXPRESSED LEGISLATIVE INTENTION" CONTRARY TO THE LAW'S PLAIN MEANING

This Court's decisions authorize examination of legislative history only to determine "whether there is 'clearly expressed legislative intention' contrary" to the plain language of the law. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987) (Stevens, J.). See also *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (O'Connor, J.); *United States v. James*, 478 U.S. 597, 606 (1986) (Powell, J.); *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (Marshall, J.); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (Rehnquist, J.).

The legislative history of the 1986 amendment to Section 921(a)(20) fails totally to meet that established standard. The most one may conclude from it, as the Ninth Circuit said in *United States v. Geyler*, 932 F.2d

1330, 1335 (9th Cir. 1991), is "that Congress quite likely never gave any specific thought to the problem of a state restoring a federal felon's civil rights when it enacted the federal firearms statute." And the Eighth Circuit determined from its review of the legislative history in *United States v. Edwards*, 946 F.2d 1347, 1349 (8th Cir. 1991), that it "does not specifically discuss the situation we have here (of a state restoration of rights law exempting a federal felon from section 922(g))." The court of appeals concluded, however, that "[a]lthough the legislative history does not discuss the effect of state law restorations of civil rights on federal felons, it does dispel the government's argument that the last two sentences of section 921(a)(20) are parts of a single idea and that the term 'restoration of civil rights' must be limited by the language in the preceding sentence about the 'law of the jurisdiction in which the proceedings were held.'" 946 F.2d at 1349-50.

A. The Overriding Congressional Objective of the FOPA Was To Enhance, Not Diminish, the Rights of Gun Owners.

Unlike earlier federal gun control laws, the 1986 federal firearms statute was designed to enlarge rights of gun owners. The title of the law—Firearms Owners' Protection Act—is itself an indication of its purpose. The Congressional findings on which the law was based included the reaffirmation of the constitutional rights to keep and bear arms and to be secure against unreasonable search and seizure. Pub. L. No. 99-308, 100 Stat. 449 (1986). Congress explicitly reaffirmed the finding made in 1986 that it did not wish "to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms. . . ." *Id.* Section 1(b)(2) of the FOPA declared that "additional legislation is required to reaffirm" this intent of Congress.

B. The Senate and House Reports Do Not Support Any Federal/State Distinction in Application of the Restoration-of-Rights Provisions.

Between 1982 and 1986, three committee reports were presented on the subject of pending amendments to the federal firearms laws. Only one report, H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986), was issued during the Congressional session in which the FOPA was enacted. Its use as legislative history for the FOPA is extremely limited, however, since the report actually accompanied H.R. 4332, a bill endorsed by the FOPA's opponents. "[T]he report explains not why FOPA should have been adopted, but rather, why it ought to have been *rejected*." Hardy, *The Firearm Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 588 (1987) (emphasis in original). See *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (recognizing extremely limited use of a committee report analyzing meaning of a statute the committee did not even draft).

The bill that ultimately became the FOPA was introduced in the Ninety-Ninth Congress as S. 49. The House Report enumerates "negative aspects of S. 49" by reprinting an assessment of the FOPA prepared by the Bureau of Alcohol, Tobacco and Firearms. This report criticizes both the "Relief from Disabilities" provision and the "Definition of Conviction" provision contained in S. 49. H.R. Rep. No. 495, 99th Cong., 2d Sess. 19-20 (1986).

With regard to the definition of conviction, the only reference that relates, even peripherally, to the issue now before the Court in the House Report says (H.R. Rep. No. 495, 99th Cong., 2d Sess. 20 (1986)):

> The bill provides that what constitutes a felony conviction would be determined by the law of the jurisdiction where the conviction occurred. This would require the Bureau to examine the peculiar laws of each State to determine whether a person is convicted for Federal purposes. Further, any con-

> viction which has been expunged or pardoned would not be considered a disabling offense under GCA. Under present law, State pardons and State court proceedings which set aside a plea or verdict of guilty upon a successful completion of probation do not eliminate the underlying conviction insofar as Federal Law is concerned and such a person must still apply for and receive relief from Federal firearms disabilities.

It appears from the House Report that neither the FOPA's opponents nor its supporters read the bill as providing anything other than identical treatment to federal and state convictions that were affected by the operation of state law. At no point in the Report was it suggested that federal convictions would be treated differently from state convictions for purposes of any restoration-of-rights or relief-from-disabilities provisions. Nor was it suggested at any time that the provision regarding the definition of conviction—the penultimate sentence of Section 921(a)(20)—had any bearing upon the interpretation of the last sentence, which described the convictions that were not to be considered as convictions under the federal firearms laws.

The earlier Senate Reports also provide no support whatever for the government's position—much less any "clearly expressed legislative intention" that federal convictions are to be unaffected by state restorations of civil rights. The Senate Report that accompanied the initial version of the FOPA introduced as S. 1030 in the Second Session of the Ninety-Seventh Congress began with the statement of the Judiciary Committee majority that the bill's purpose was "to protect firearms owners' constitutional rights, civil liberties, and rights to privacy." S. Rep. No. 476, 97th Cong., 2d Sess. 1 (1982).

From the time S. 1030 was first reported out of the Senate Judiciary Committee it contained substantially the amendment to Section 921(a)(20) that ultimately was

enacted in the FOPA and that is the subject of these cases. The Senate Report explained the reason for the last sentence of the then-proposed Section 921(a)(20) as follows (S. Rep. No. 476, 97th Cong., 2d Sess. 18 (1982)):

> S. 1030 would also exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision as to pardons in 18 U.S.C. section 1202, relating to possession of firearms, but through oversight does not include such provision in 18 U.S.C. section 922, dealing with their purchase or receipt. This oversight has resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision that he may possess it. *Thrall v. Wolfe*, 503 F.2d 318 (7th Cir. 1974). This change would remove that anomaly. . . .

The same explanation—almost *in haec verba*—appeared in the Senate Report that accompanied the Ninety-Eighth Congress' version of the Firearm Owners' Protection Act. S. Rep. No. 583, 98th Cong., 2d Sess 7 (1984). Since the 1984 Report was issued after this Court's *Dickerson* decision, however, the Judiciary Committee's explanation of the penultimate sentence in the then-proposed Section 921(a)(20) contained a footnote that referred specifically to *Dickerson* (*id.* at p. 7, n. 16);

> For instance, the Supreme Court, in *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986 (1983), construed this definition to include guilty pleas where no final judgment had been rendered by the Court. S. 914, as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary.

There was no discussion on either the House or Senate floor regarding the amendment to Section 921(a)(20). The only reference to it is in a "fact sheet" presented by

Senator Hatch during the Senate debate (131 Cong. Rec. 18179 (1985)):

> The Protection Act provides that a person convicted of a felony who secures a pardon, restoration of civil rights, or whose record has been expunged is no longer considered a felon for the purposes of possessing firearms—courts have held this not true under existing law.

This summary, like the explanations in the Congressional reports, does not distinguish between federal and state convictions or between federal and state restorations of rights. Rather than demonstrating a "clearly expressed legislative intention" that is contrary to the literal meaning of Section 921(a)(20), it shows a legislative intention consistent with the plain understanding of the statutory language. A person convicted of *any* felony—state or federal—may possess or receive firearms if his rights have been resorted by *any* law—state or federal.

C. There Is No Sound Policy Reason Why Federal Felons Should Face Greater Obstacles in Overcoming Firearms Disabilities than State Felons.

We turn, in this regard, finally to the question whether Congress would have wanted to distinguish, for purposes of firearms ineligibility, between federal and state felons. We submit that no sound policy justifies such a distinction. Indeed, to the extent that there is a difference in this respect, Congress had *more* reason permanently to disqualify state felons than permanently to disqualify federal felons.

Apart from narcotics offenders (many of whom are covered, in any event, by the ineligibility of narcotics users provided in Section 922(g)(3)), a significant percentage of federal felons are "white-collar" criminals. Those who commit antitrust violations or business crimes are exempted by Section 921(a)(20)(A), but that limited statutory exception does not cover fraud, embezzlement,

tax evasion, or similar non-violent offenses. See *United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) (holding that fraudulent customs declaration was not unfair trade practice within meaning of 18 U.S.C. § 921(a)(20)). There is obviously less risk to public safety if "white collar" offenders possess weapons than if perpetrators of violent crimes usually prosecuted under state law are permitted to carry firearms.

Is it reasonable to assume that Congress intended that individuals who commit violent crimes but have been restored the right to vote or to serve as jurors should be permitted to possess firearms while tax evaders or violators of the customs laws whose rights have been similarly restored should forever be denied the right to own a gun? We submit that sound policy could at least as easily dictate the opposite result—*i.e.*, that there be no firearms authorization for state felons, regardless of their restoration of rights to vote or serve on juries, while authorization to carry weapons be liberally granted to federal felons who are restored by a state to their full civil rights.

It is, of course, difficult to quarrel with the general "purpose of the statute" defined by the court below—*i.e.*, "to keep guns out of the wrong hands" (Pet. App. 20a). The more probing question, however, is what "hands" Congress believed to be "wrong." And on this score, we submit that Congress would more rationally have viewed felons convicted of violent crimes in state courts as "wrong" possessors of firearms than those convicted of non-violent crimes in federal courts.

Finally, the concern expressed by the court below regarding the possibility of "confusion" or of a "civil rights bath" if a state's restoration-of-rights law were to affect a federal felony conviction (Pet. App. 21a) is not a reason to qualify Section 921(a)(20) as the Fourth Circuit seeks to do. The anomalous result hypothesized by the court of appeals would not be cured by distinguishing between federal and state convictions. It relates, rather, to

whether the law of a defendant's residence or of the state of his conviction controls.

If the residence of the felon determines whether he is still disqualified from possessing firearms, the same seemingly dissonant result that the court of appeals hypothesized in its opinion would follow even if the original conviction were in a state court. Any felon living in a State other than the one where he was convicted of a state or federal felony could claim that his firearms eligibility is determined by the restoration-of-rights law of the jurisdiction where he resides, even if no restoration of rights were authorized in the State where he was convicted.

III. THE "RULE OF LENITY" PRECLUDES ANY INTERPRETATION OF SECTION 921(a)(20) THAT CONFLICTS WITH ITS LITERAL MEANING

A concluding consideration that requires reversal of the Fourth Circuit's decision is the "rule of lenity" that governs the construction of criminal statutes. In this case, as was true in *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110, (1992) (Souter, J.), the "rule of lenity" simply seals a result that is warranted by the statutory language and by the legislative history. *Thompson* was a firearms case involving an unclear statute in which the Court, citing *Crandon v. United States*, 494 U.S. 152, 169 (1990), applied the rule of lenity to hold an excise tax inapplicable to short-barrelled rifles. Because the statutory provision was a part of the National Firearms Act, which carries criminal penalties, the rule of lenity was applied. The warning given by the Court in the *Crandon* opinion should be borne in mind (494 U.S. at 160):

> Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.

In *Dowling v. United States*, 473 U.S. 207, 213 (1985), the Court quoted the rule of statutory interpretation applicable to criminal cases set out in *Williams v. United States*, 458 U.S. 279, 290 (1982), that quoted from *United States v. Bass*, 404 U.S. 336, 347 (1971), that had, in turn, quoted from *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952):

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

Congress has surely not said, "in language that is clear and definite," that a person convicted of a felony in a federal court whose civil rights have been restored by state law may not possess a firearm. Neither petitioner Beecham nor petitioner Jones had any reason to think from the language of Section 921(a)(20) that after their rights were restored by state law they could not possess a firearm and were prevented from answering "no" to the question whether they had a felony conviction.

To be sure, the rule of lenity "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Taylor v. United States*, 495 U.S. 575, 596 (1990). That was the reason why the rule of lenity was held inapplicable in *Smith v United States*, 113 S. Ct. 2050, 2059-60 (1993). In the *Smith* case the statutory language was, as we have previously noted (pp. 15-16, *supra*), entirely unqualified. Accordingly, this Court applied the plain meaning of the statutory words and rejected the argument that the rule of lenity justified a narrowing interpretation.

The rule of lenity applies, however, when there is "statutory ambiguity." *Moskal v. United States*, 498 U.S. 103, 107 (1990). This Court has further defined the rule as governing "situations in which a reasonable doubt per-

sists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Id.*, quoting from *Bifulco v. United States,* 447 U.S. 381, 387 (1980).

For reasons previously stated in this brief, we believe that the language, structure, legislative history and policies of the FOPA all require that there be no distinction between federal and state convictions that are subject to state restoration of rights. But whatever may be said of our analysis, it is clearly and unmistakably true that Section 921(a)(20) does not unambiguously reject it. It does not put potential gun-owners on notice of the opposite result—*i.e.*, that if they have been convicted in federal courts their state restorations of rights are ineffective to remove their ineligibility. To the extent, therefore, that the government contends that the court of appeals' construction is a proper reading of Section 921(a)(20), the statutory language is, at least, "ambiguous." The rule of lenity—which rests on the concept of fair warning—is, therefore, applicable and precludes the conviction of the petitioners.

IV. REVERSAL OF THE COURT OF APPEALS LEAVES REMAINING ISSUES FOR THE FOURTH CIRCUIT ON REMAND

On the basis of its construction of Section 921(a)(20), the court of appeals reversed the dismissal of petitioner Jones' indictment and reversed the entry of a judgment of acquittal in petitioner Beecham's case. If, as we contend, the court of appeals' reading of Section 921(a)(20) was wrong, the judgments in both cases must be reversed and the cases remanded for possible consideration of issues that the court below did not reach.

A. The Court of Appeals May Decide Which State's Restoration-of-Rights Law Governs.

In the *Beecham* case, the district court considered whether the restoration-of-rights law contemplated by Section 921(a)(20) is the law of the State where the conviction occurred or that of the State in which the convicted felon resides. The district judge concluded that in Beecham's case, the law of Tennessee controls. J.A. 13-14.

The applicable Tennessee statute, Tenn. Code Ann. § 40-29-101(a) (1990), declares:

> (a) Persons rendered infamous or deprived of the rights of citizenship by the judgment of any state or federal court may have their full rights of citizenship restored by the circuit court.

Any person convicted in Tennessee, whether in a state or federal court, prior to July 1, 1986, may petition to the circuit court for a restoration of his rights under § 40-29-102. The next statutory section prescribes that notice be given to the United States Attorney in the case of any such petition relating to a federal conviction.

By contrast, the law of North Carolina makes restoration of civil rights automatic. N.C. Gen. Stat. § 13-1 (1992) declares:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:
>
> * * * *
>
> (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

It is clear that *both* the Tennessee and North Carolina laws restore rights for federal convictions. The court of appeals did not, however, decide *which* law controls or, indeed, whether a defendant may claim the benefit of either law that restores his rights.

Nor did it do so in petitioner Jones' case. The applicable Ohio law (Ohio Rev. Code Ann. § 2961.01 (Anderson 1993)) and the West Virginia procedure for restoring civil rights through issuance of a certificate of discharge are less explicit in their coverage. However, the "Official Certificate of Discharge" received by Jones from the State of West Virginia restoring "any or all civil rights heretofore forfeited" (J.A. 22) has been held to be a sufficient instrument to restore civil rights within the meaning of Section 921(a)(20). *United States v. Haynes*, 961 F.2d 50, 53 (4th Cir. 1992); *United States v. Ball*, No. 90-5363, 1992 U.S. App. LEXIS 5238 (4th Cir. 1992) (unreported). Whether Jones' receipt of that certificate is sufficient or whether Ohio's procedure must be followed is a question that the court of appeals did not reach and that is open on remand.

B. The Court of Appeals May Decide Issues of Construction Relating to the Applicable State Laws.

In a footnote to its *Jones* opinion, the Fourth Circuit stated that it was not considering West Virginia law "to determine whether the state's restoration scheme was intended to cover federal felons." Pet. App. 15a, n. 5. That issue is, of course, not before this Court and may be open on remand. As stated above, however, the Fourth Circuit, in *Haynes* and *Ball*, has already held West Virginia's Certificates of Discharge sufficient to remove firearms disabilities under federal law. Both opinions note that although West Virginia law now contains a specific prohibition on firearms possession by a convicted felon (W. Va. Code § 61-7-7 (1989)), that section was not effective at the time that the civil rights of those defendants were restored. *Haynes*, 961 F.2d at 53; *Ball*, 1992

U.S. App. LEXIS 5238, at *6 n.2. The same is true for Jones.

C. The Court of Appeals May Decide Other Issues.

The district judge entered a "judgment of acquittal" after the jury's verdict in the *Beecham* case because he found that the prosecution had failed to prove an element of the offense—*i.e.*, that Beecham had a felony conviction within the meaning of the federal firearms laws. J.A. 16. In this regard, the district court relied on a Fourth Circuit opinion that had held that it was the prosecution's burden to establish that the defendant had a felony conviction that could be considered a predicate conviction under 18 U.S.C. § 922(g). J.A. 15-16.

The court of appeals did not consider the burden-of-proof issue because it reversed the district court on the basis of its *Jones* decision. On remand, that issue might be open for consideration by the lower court.

On the other hand, petitioner Beecham may contend on remand that since a judgment of acquittal was entered by the district court because the prosecution's proof was inadequate, any issues relating to proof (as contrasted with the issue of statutory construction that is before this Court) cannot be the subject of a government appeal under 18 U.S.C. § 3731 and this Court's decision in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Moreover, the limited appeal that the government took may have waived any other issues.

CONCLUSION

For the foregoing reasons, the judgments entered by the court of appeals in both the *Beecham* and *Jones* cases should be reversed and the cases remanded to the court of appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

INDEX OF STATE STATUTES AND CONSTITUTIONAL PROVISIONS SUSPENDING CIVIL RIGHTS OF CONVICTED FELONS

I. STATE ENACTMENTS SUSPENDING ALL CIVIL RIGHTS OF CONVICTED FELONS

FLORIDA

Fla. Stat. Ann. § 944.292 (West (1985). Suspension of civil rights.

IDAHO

Idaho Code § 18-310(1) (1949 & Supp. 1993). Imprisonment—Effect on civil rights and offices.

NEW YORK

N.Y. Civ. Rights Law § 79(1) (McKinney 1992). Forfeiture of office and suspension of civil rights.

OKLAHOMA

Okla. Stat. Ann. tit. 21, § 65 (West 1983). Civil rights suspended.

II. STATE ENACTMENTS DISQUALIFYING CONVICTED FELONS FROM VOTING

ALABAMA

Ala. Const. art. VIII § 182. Certain persons disqualified from registering and voting.

ALASKA

Alaska Const. art. V, § 2. Disqualifications.

Alaska Stat. § 15.05.030 (1962). Loss and restoration of voting rights.

ARIZONA

Ariz. Const. art. VII, § 2. Qualifications of voters; disqualification.

Ariz. Rev. Stat. Ann. § 16-101(A)(5) (1956 & Supp. 1993). Qualifications of registrant; definition.

ARKANSAS

Ark. Const. art. 3, § 1. Qualifications of electors—Equal suffrage—Poll tax.

CALIFORNIA

Cal. Const. art. 2, § 4. Improper practices; certain persons as electors; prohibition.

COLORADO

Colo. Const. art. VII, § 10. Disfranchisement during imprisonment.

CONNECTICUT

Conn. Gen. Stat. § 9-46 (West 1989). Forfeiture of electoral rights.

DELAWARE

Del. Const. art. V, § 2. Qualifications for voting; members of the Armed Services of the United States stationed within State; persons disqualified; forfeiture of right.

Del. Code Ann. tit. 15, § 1701 (1974). Qualifications for registration as qualified voter.

FLORIDA

Fla. Const. art. VI, § 4(a). Disqualifications.

Fla. Stat. Ann. § 97.041(3)(b) (West 1982 & Supp. 1993). Qualifications to register or vote.

GEORGIA

Ga. Code Ann. § 21-2-219(a)(5)(a.1)(1) (1993). Qualifications of voters generally; reregistration of voters purged from list; eligibility of voters who reside in another state but are ineligible to vote there; false statements.

Ga. Code § 21-3-133(a)(2) (1993). Purging of list of electors by municipalities maintaining their own registration system; notice to voter of disqualification; request by voter for continuance of registration.

HAWAII

Haw. Const. art. II, § 2.

IDAHO

Idaho Const. art. VI, § 3. Disqualification of certain persons.

Idaho Code § 34-402 (1949 & Supp. 1993). Qualifications of electors.

ILLINOIS

730 ILCS 5/3-5 (Smith-Hurd 1993). Convicts.

INDIANA

Ind. Const. art III, § 8. Conviction of infamous crime.

IOWA

Iowa Const. art. II, § 5. Disqualified persons.

KANSAS

Kan. Const. art. 5, § 2. Disqualification to vote.

KENTUCKY

Ky. Const. § 145(1). Persons entitled to vote.

Ky. Rev. Stat. Ann. § 116.025(2) (Michie/Bobbs-Merrill 1993). Eligibility to vote.

LOUISIANA

La. Rev. Stat. Ann. § 18:1303 (West 1979 & Supp. 1993). Persons entitled to vote in compliance with this Chapter.

MARYLAND

Md. Const. art. I, § 4. Right to vote of persons convicted of certain crimes and persons under guardianship.

Md. Code Ann., Elec. art. 33, § 3-4(c) (1957). Qualifications.

MINNESOTA

Minn. Const. art. VII, § 1. Eligibility: place of voting; ineligible, persons.

MISSISSIPPI

Miss. Const. art. 12, § 241.

MISSOURI

Mo. Const. art. VII, § 2. Qualifications of voters—disqualifications.

Mo. Ann. Stat. § 561.026 (Vernon 1970 & Supp. 1993). Disqualification from voting and jury service.

MONTANA

Mont. Const. art. VI. § 2. Qualified elector.

NEBRASKA

Neb. Const. art. VI, § 2. Who disqualified.

Neb. Rev. Stat. § 29-112 (1989). Convicts; disqualified as electors, jurors, officeholders; warrant of discharge; effect.

Neb. Rev. Stat. § 29-113 (1989). Convicts of other states; disqualified as electors, jurors, officeholders; general pardon; effect.

Neb. Rev. Stat. § 32-1048 (1988). Persons disqualified from voting; exceptions.

NEVADA

Nev. Const. art. 2, § 1. Right to vote; qualifications of elector; qualifications of nonelector to vote for President and Vice President of the United States.

NEW HAMPSHIRE

N.H. Const. pt. 1, art. 11. Elections and Elective Franchises.

NEW JERSEY

N.J. Const. art. 2, § 7. Persons denied right of suffrage, conviction of crime; restoration of right.

N.J. Stat. Ann. § 19:4-1(6)(8) (West 1989). Constitutional qualifications; persons not having right of suffrage; right to register.

N.J. Rev. Stat. § 2C:51-3 (1982). Voting and jury service.

NEW MEXICO

N.M. Const. art. VII, § 1. Qualifications of voters; absentee voting; school elections; registration.

N.M. Stat. Ann. § 31-13-1(A) (Michie 1978). Effect of criminal conviction upon civil rights; governor may pardon or grant restoration of citizenship.

NEW YORK

N.Y. Const. art. 2, § 3. Persons excluded from the right of suffrage.

N.Y. Elec. Law § 5-106(2)(4) (McKinney 1978 & Supp. 1994). Qualifications of voters; reasons for exclusion.

NORTH CAROLINA

N.C. Const. art. 6, § 2(3). Qualifications of voter.

N.C. Gen. Stat. § 163-55(2) (1991). Qualifications to vote; exclusion from electoral franchise.

NORTH DAKOTA

N.D. Const. art. II, § 2.

OHIO

Ohio Const. art. V, § 4. Forfeiture of elective franchise.

Ohio Rev. Code Ann. § 2961.01 (Anderson 1993). Civil Rights of convicted felons.

OKLAHOMA

Okla. Stat. Ann. tit. 26, § 4-101 (West 1991). Persons entitled to become registered voters—Exceptions.

OREGON

Or. Const. art. II, § 3. Rights of certain electors.

RHODE ISLAND

R.I. Const. art. II, § 1. Persons entitled to vote.

SOUTH CAROLINA

S.C. Const. art. II, § 7. Disqualifications by reason of mental incompetence or conviction of crime.

S.C. Code Ann. § 7-5-120. (Lawyer's Co-op. 1991). Qualifications for registration; persons disqualified.

SOUTH DAKOTA

S.D. Const. art. VII, § 2. Voter qualification.

S.D. Codified Laws Ann. § 23A-27-35 (1988). Suspension of civil rights on sentence to penitentiary—Prisoner as witness—Restoration of rights on suspension or termination of sentence.

TENNESSEE

Tenn. Const. art. I, § 5. Elections to be free and equal—Right of suffrage.

TEXAS

Tex. Const. art. XVI, § 2. Exclusions from office, jury service and right of suffrage; protection of right of suffrage.

Tex. Elec. Code § 11.002 (West 1986 & Supp. 1994). Qualified voter.

UTAH

Utah Const. art. IV, § 6. Mentally incompetent persons and certain criminals ineligible to vote.

VIRGINIA

Va. Const. art. II, § 1. Qualifications of voters.

WASHINGTON

Wash. Const. art. VI, § 3. Who Disqualified.

WEST VIRGINIA

W.Va. Const. art. IV, § 1. Elections and Officers.

W.Va. Code § 3-1-3 (1990). Persons entitled to vote.

WISCONSIN

Wis. Const. art. III, § 2(4)(a). Implementation.

Wis. Stat. Ann. 6.03(1)(b) (West 1986 & Supp. 1993). Disqualification of electors.

WYOMING

Wyo. Const. art. 6, § 6. What persons excluded from franchise.

III. STATE ENACTMENTS DISQUALIFYING CONVICTED FELONS FROM HOLDING PUBLIC OFFICE/OFFICE OF HONOR, TRUST, OR PROFIT [1]

ALABAMA

Ala. Const. art. IV, § 60. Conviction of certain crimes bar to eligibility for legislature and to holding state office of trust or profit.

Ala. Code § 36-2-1 (1975). Person not eligible to hold state office; holding of state and federal offices of profit or two state offices of profit.

ALASKA

Alaska Const. art. II, § 2. Members' Qualifications.*

Alaska Stat. § 24.05.030 (1992). Qualifications of members.*

Alaska Stat. § 29.20.240(a) (1982). Qualifications for the office of mayor.*

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[1] An asterisk denotes that eligibility to vote establishes qualification to hold public office. Therefore, where an asterisk appears next to the constitutional provisions and statutes listed below, convicted felons are disqualified from holding public office, because the state disqualifies them from voting.

ARIZONA

Ariz. Const. art. VII, § 15. Qualifications for public office.*

Ariz. Rev. Stat. Ann. § 38-510 (Michie 1993). Penalties.

ARKANSAS

Ark. Const. art. 5, § 9. Persons convicted ineligible.

Ark. Code Ann. § 7-1-104 (1993). Miscellaneous felonies—Penalties.

CALIFORNIA

Cal. Gov't Code Ann. § 1021 (West 1980). Conviction of crime.

COLORADO

Colo. Const. art. 7, § 6. Electors only eligible to office*

Colo. Rev. Stat. Ann. § 1-4-501 (West Supp. 1993). Only eligible electors eligible for office.*

Colo. Rev. Stat. Ann. § 18-1-105(3) (West 1993). Felonies classified—presumptive penalties.

CONNECTICUT

Conn. Const. art. 6th, § 10. Eligibility to office.*

Conn. Const. art. 4th, § 5. Governor. Qualifications.*

Conn. Const. art. 3rd, § 3. Senate, number, qualifications.*

Conn. Gen. Stat. § 9-46 (West 1989). Forfeiture of electoral rights.*

DELAWARE

Del. Const., art. II, § 21. Conviction of crime as ban to public office.

Del. Const. art. XV, § 6. Behavior of officers; removal for misbehavior or infamous crime.

FLORIDA

Fla. Const. art. VI, § 4(a). Disqualifications.

Fla. Stat. Ann. § 114.01(j) (West 1988). Office deemed vacant in certain cases.

Fla. Stat. Ann. § 876.29 (West 1988). Subversive person prohibited from holding office or employment.

HAWAII

Haw. Rev. Stat. § 831-2(2) (1988). Rights lost.

IDAHO

Idaho Const. art. VI, § 3. Disqualification of certain persons.

Idaho Code § 18-109 (1949). Definition of crime.

Idaho Code § 18-310 (1949 & Supp. 1993). Imprisonment—Effect on civil rights and offices.

Idaho Code § 59-101 (1949). Qualifications in general.*

ILLINOIS

65 ILCS 5/3.1-10-5 (Smith-Hurd 1993). Qualifications; elective office.

10 ILCS 5/29-15 (Smith-Hurd 1993). Conviction deemed infamous.

INDIANA

Ind. Code Ann. § 3-8-1-5(b)(3)(B) (Burns Supp. 1993). Disqualification; bribery or threats; federal law violations; felonies.

IOWA

Iowa Code Ann. § 66.1 (West 1991). Removal by court.

LOUISIANA

La. Rev. Stat. Ann. § 18:451 (West 1979 & Supp. 1993). Qualifications of candidates.

La. Stat. Ann. § 42:1411(A) (West 1990 & Supp. 1993). Public officer; ground for removal; suspension; definitions.

MARYLAND

Md. Const. art. II, § 4. Qualifications of Attorney General.*

Md. Const. art. II, § 5. Qualification of Governor and Lieutenant Governor.

MASSACHUSETTS

Mass. Ann. Laws ch. 31, § 50 (Law. Co-op. 1993). Certain Persons Ineligible for Civil Service Position.

MICHIGAN

Mich. Const. art. IV, § 7. Legislators; qualifications, removal from district.

Mich. Comp. Laws Ann. § 168.161 (West 1989). State senator or representative; eligibility.

MISSISSIPPI

Miss. Const. art. 12, § 250.

Miss. Code Ann. § 25-5-1 (1972). Removals from office.

MISSOURI

Mo. Ann. Stat. § 561.021 (Vernon 1970 & Supp. 1993). Forfeiture of public office—disqualification.

MONTANA

Mont. Const. art. IV, § 4. Eligibility for public office.

NEBRASKA

Neb. Rev. Stat. § 29-112 (1989). Convicts; disqualified as electors, jurors, officeholders; warrant of discharge; effect.

Neb. Rev. Stat. § 29-113 (1989). Convicts of other states; disqualified as electors, jurors, officeholders; general pardon; effect.

NEVADA

Nev. Const. art. 15, § 3. Eligibility for public office.

Nev. Rev. Stat. Ann. § 281.040 (Michie 1990). Eligibility for office of honor, profit or trust.

NEW HAMPSHIRE

N.H. Stat. Ann. § 607-A:2(I)(b) (1986). Rights Lost.

NEW JERSEY

N.J. Rev. Stat. § 2C:51-2 (1982 & Supp. 1993). Forfeiture of public office.

NEW MEXICO

N.M. Stat. Ann. § 31-13-1(A) (1993). Effect of criminal conviction upon civil rights; governor may pardon or grant restoration of citizenship.

NEW YORK

N.Y. Civ. Rights Law § 79(1) (McKinney 1992). Forfeiture of office and suspension of civil rights.

NORTH CAROLINA

N.C. Const. art. 6, § 8. Disqualifications for office.

NORTH DAKOTA

N.D. Cent. Code § 44-01-01 (1993). Eligibility to office.*

OHIO

Ohio Const. art. V, § 4. Forfeiture of elective franchise.*

Ohio Const. art. XV, § 4. Who eligible to office.*

Ohio Rev. Code Ann. § 2961.01 (Anderson 1993). Civil Rights of convicted felons.*

OKLAHOMA

Okla. Const. art. V, § 18. Ineligibility—Federal and state officers—Conviction of felony.

Okla. Stat. Ann. tit. 21, § 65 (West 1983). Civil rights suspended.

Okla. Stat. Ann. tit. 21, § 312 (West 1983). Forfeiture of office—Disqualification to hold office.

Okla. Stat. Ann. tit. 51, § 8 (West 1988). Office vacant, when.

PENNSYLVANIA

Pa. Const. art. 2, § 7. Ineligibility by criminal convictions.

Pa. Const. art. 6, § 7. Removal of civil officers.

SOUTH CAROLINA

S.C. Const. art. XVII, §1. Qualifications of officers.

S.C. Code Ann. § 24-21-990 (Law. Co-op. 1976 & Supp. 1992). Civil rights restored upon pardon.

SOUTH DAKOTA

S.D. Const. art. III, § 3. Qualifications for legislative office—Officers ineligible.

S.D. Const. art. III, § 4. Disqualification for conviction of crime—Defaults on public money.

S.D. Codified Laws Ann. § 23A-27-35 (1988). Suspension of civil rights on sentence to penitentiary—Prisoner as witness—Restoration of rights on suspension or termination of sentence.

TENNESSEE

Tenn. Code. Ann. § 4-36-202 (1991). Eligibility for appointment and membership.

Tenn. Code. Ann. § 6-31-201 (1992). Vacancies in council.

Tenn. Code Ann. § 8-47-101 (1993). Officers subject to removal—Grounds.

TEXAS

Tex. Const. art. XVI, § 2. Exclusions from office, jury service and right of suffrage; protection of right of suffrage.

UTAH

Utah Const. art. VII, § 3(4). Qualifications of officers.*

VIRGINIA

Va. Code Ann. § 24.2-231 (Michie 1950). Forfeiture of office by person sentenced for commission of certain crimes.

WASHINGTON

Wash. Const. art. III, § 25. Qualifications, Compensation, Offices Which may be Abolished.

WEST VIRGINIA

W.Va. Const. art. VI, § 14. Bribery Conviction Forfeits Eligibility.

W.Va. Code § 3-2-11 (1993). Appointment of registrars; qualification and duties.

W.Va. Code § 6-5-5 (1993). Disqualification by conviction of treason, felony, or bribery.

W.Va. Code § 6-6-9 (1993). Forfeiture of office on conviction of offense.

W.Va. Code § 61-5-3 (1992). Penalties for perjury, subornation of perjury, and false swearing.

W.Va. Code § 61-5-4 (1992). Bribery or attempted bribery; penalty.

WISCONSIN

Wis. Const. art. XIII, § 3. Eligibility to office.

Wis. Stat. Ann. § 17.03(5) (West 7986 & Supp. 1993). Vacancies, how caused.

WYOMING

Wyo. Stat. § 6-5-113 (1977). Removal from office after judgment of conviction.

Wyo. Stat. § 6-10-106(a) (1977). Rights lost by conviction of felony; restoration.

IV. STATE ENACTMENTS DISQUALIFYING CONVICTED FELONS FROM SERVING AS JURORS

ALABAMA

Ala. Code § 12-16-60(4) (1975). Qualifications of jurors.

ALASKA

Alaska Stat. § 09.20.020 (1983 & Supp. 1993). Disqualification of jurors.

Alaska Stat. § 09.20.050 (1983 & Supp. 1993). Jury list.

ARIZONA

Ariz. Rev. Stat. Ann. § 21-201(3) (1956 & Supp. 1993). Qualifications.

ARKANSAS

Ark. Code Ann. § 16-21-101 (Michie 1987). Qualifications.

Ark. Code Ann. § 16-31-102(5) (Michie 1987). Disqualifications.

CONNECTICUT

Conn. Gen. Stat. Ann. § 51-217(a)(1), (b)(1) (West 1985 & Supp. 1993). Qualification of jurors.

DELAWARE

Del. Code Ann. tit. 10, § 4509(6) (1974). Disqualification from jury service.

FLORIDA

Fla. Stat. § 40-013(1) (West 1988 & Supp. 1993). Persons disqualified or excused from jury service.

GEORGIA

Ga. Code Ann. § 15-12-60(b)(2) (1990). Qualifications of grand jurors.

HAWAII

Haw. Rev. Stat. § 612-4(4) (1988). Grounds of disqualification.

IDAHO

Idaho Const. art. VI, § 3. Disqualification of certain persons.

Idaho Code § 2-209(2)(d) (1971). Court determination of qualification of prospective juror—Qualifications—Physician's certificate of physical or mental disability.

ILLINOIS

705 ILCS 305/2 (Smith-Hurd 1993). Petit jurors—Selection—Qualifications.

INDIANA

Ind. Code. Ann. § 33-4-5.5-10 (Burns 1982). Juror qualification form; mailing; contents; failure to return; misrepresentation.

KANSAS

Kan. St. Ann. § 43-156 (1986). Right to serve as juror; qualification as elector.

KENTUCKY

Ky. Rev. Stat. Ann. § 29A.080(2)(f) (Michie/Bobbs-Merrill 1976). Disqualifications for jury service.

LOUISIANA

La. Code Crim. Proc. art. 401 (West 1991). General qualifications of jurors.

MARYLAND

Md. Code Ann., Cts. & Jud. Proc. § 8-207(b)(5) (1989 & Supp. 1993). Qualifications for jury service.

MICHIGAN

Mich. Comp. Laws Ann. § 600.1307a(1)(e) (West 1981 & Supp. 1993). Jurors; qualifications, age exemption, service.

MISSISSIPPI

Miss. Code Ann. § 13-5-1 (1972). Who are competent jurors; determination of literacy.

MISSOURI

Mo. Ann. Stat. § 561.016 (Vernon 1970). Basis of disqualification or disability.

Mo. Ann. Stat. § 561.026 (Vernon 1970 & Supp. 1993). Disqualification from voting and jury service.

MONTANA

Mont. Code Ann. § 3-15-301 (1992). Who competent.

Mont. Code Ann. § 3-15-303 (1992). Who not competent.

NEBRASKA

Neb. Rev. Stat. § 29-112 (1989). Convicts; disqualified as electors, jurors, officeholders; warrant of discharge; effect.

Neb. Rev. Stat. § 29-113 (1989). Convicts of other states; disqualified as electors, jurors, officeholders; general pardon; effect.

NEVADA

Nev. Rev. Stat. § 6.010 (1986). Persons qualified to act as jurors.

NEW JERSEY

N.J. Rev. Stat. § 2C:51-3 (1982). Voting and jury service.

NEW MEXICO

N.M. Stat. Ann. § 38-5-1. (Michie 1978 & Supp. 1993). Qualification of jurors.

NEW YORK

N.Y. Judiciary Law § 509 (McKinney 1992). Qualifications of jurors.

N.Y. Civ. Rts. § 13 (McKinney 1992). Right to serve on juries.

NORTH CAROLINA

N.C. Gen. Stat. § 9-3 (1986). Qualifications of prospective jurors.

N.C. Gen. Stat. § 163-69.3 (1991). Removal for conviction of a felony.

NORTH DAKOTA

N.D. Cent. Code § 27-09.1-08 (1991 & Supp. 1993). Disqualification from jury service.

OKLAHOMA

Okla. Stat. tit. 38, § 28 (West 1990). Qualifications and exemptions.

OREGON

Or. Rev. Stat. § 137.281(3)(c) (1987 & Supp. 1992). Withdrawal of rights during term of imprisonment; restoration of rights.

PENNSYLVANIA

42 Pa. Cons. Stat. Ann. § 4502 (1981). Qualifications of jurors.

RHODE ISLAND

R.I. Gen. Laws § 9-9-1.1(c) (Supp. 1993). Qualifications of jurors.

SOUTH CAROLINA

S.C. Code Ann. § 14-7-810(1) (Law. Co-op. 1976 & Supp. 1992). Enumeration of disqualifications in any court.

SOUTH DAKOTA

S.D. Codified Laws Ann. § 23A-27-35 (1980 & Supp. 1993). Suspension of civil rights on sentence to penitentiary—Prisoner as witness—Restoration of rights on suspension or termination of sentence.

TENNESSEE

Tenn. Code Ann. §§ 22-1-102(1), 22-1-102(2) (1988). Excluded persons.

TEXAS

Tex. Const. art. XVI, § 2. Exclusions from office, jury service and right of suffrage; protection of right of suffrage.

Tex. Gov't Code Ann. § 62.102(4), § 62.102(7) West 1988). General Qualifications for Jury Service.

VERMONT

Vt. Code Ann. tit. 12, § 64 (1973). Jurors--Conviction of crime; citizenship and residence.

VIRGINIA

Va. Code Ann. § 8.01-338(2) (Michie 1950). Who disqualified.

WASHINGTON

Wash. Rev. Code Ann. § 2.36.070(5) (West 1988 & Supp. 1993). Qualification of jurors.

WEST VIRGINIA

W. Va. Code § 52-1-8(b)(5) (Supp. 1993). Disqualification from jury service.

WISCONSIN

Wis. Stat. Ann. § 6.03(1)(b) (West 1986 & Supp. 1993). Disqualification of electors.

Wis. Stat. Ann. § 756.01 (West 1991). Qualifications of jurors.

WYOMING

Wyo. Stat. § 1-11-102 (1977). Convicted felon disqualified.

Wyo. Stat. § 6-10-106 (1977). Rights lost by conviction of felony; restoration.

DISTRICT OF COLUMBIA

D.C. Code Ann. § 11-1906 (1981). Qualification of jurors.

V. STATE ENACTMENTS DISQUALIFYING CONVICTED FELONS FROM SERVING AS FIDUCIARIES

ALABAMA

Ala. Code § 43-2-22 (1975). Disqualification of certain persons to serve as executor or administrator.

ARIZONA

Ariz. Rev. Stat. Ann. § 14-5106 (Michie Supp. 1993). Disclosure requirements for proposed guardians and conservators; restrictions by local rules.

ARKANSAS

Ark. Code Ann. § 28-48-101 (Michie 1987). Persons entitled to domiciliary letters.

DELAWARE

Del. Code Ann. tit. 12, § 1508 (1974). Persons not qualified to receive letters testamentary or of administration.

FLORIDA

Fla. Stat. Ann. § 733.303 (West 1976 & Supp. 1993). Persons not qualified.

ILLINOIS

755 ILCS 5/6-13 (Smith-Hurd 1993). Who may act as executor.

INDIANA

Ind. Code Ann. § 29-1-10-1 (Burns 1989). Letters testamentary; letters of general administration; persons to whom granted; order; qualifications.

LOUISIANA

La. Rev. Stat. Ann. § 11:264.2 (West 1993). Fiduciary restriction; felony conviction.

MARYLAND

Md. Code Ann., Est. & Trusts § 5-105 (1991). Restrictions on rights to letters.

MINNESOTA

Minn. Stat. Ann. § 356A.03 (West 1991). Prohibition of certain persons from fiduciary status.

MISSISSIPPI

Miss. Code Ann. § 91-7-35 (1972). Grant of letters testamentary.

MISSOURI

Mo. Ann. Stat. § 473.140 (Vernon 1992). Removal of personal representative.

NEBRASKA

Neb. Rev. Stat. § 29-113 (1989). Convicts of other states; disqualified as electors, jurors, officeholders; general pardon; effect.

NEVADA

Nev. Rev. Stat. § 138.020 (1993). Who may serve as executor; letters with will annexed.

NORTH CAROLINA

N.C. Gen. Stat. § 35A-1290 (1987). Removal by clerk.

OKLAHOMA

Okla. Stat. Ann. tit. 58 § 102 (West 1965). Who is incompetent as executor.

SOUTH DAKOTA

S.D. Codified Laws § 30-8-1 (1984). Persons disqualified to serve as executor.

S.D. Codified Laws § 30-9-6 (1984). Persons disqualified to act as administrator.

S.D. Codified Laws § 23A-27-35 (1988). Suspension of civil rights on sentence to penitentiary—Prisoner as witness—Restoration of rights on suspension or termination of sentence.

TEXAS

Tex. Prob. Code Ann. § 78 (West 1980). Persons Disqualified to Serve as Executor or Administrator.

WASHINGTON

Wash. Rev. Code Ann. § 11.36.010 (West 1987) Parties disqualified—Result of disqualification after appointment.

Wash. Rev. Code Ann. § 11.36.021 (West 1987 & Supp. 1993). Trustees—Who may serve.

Wash. Rev. Code Ann. § 11.88.020 (West 1987 & Supp. 1993). Qualifications.

WYOMING

Wyo. Stat. § 2-3-123 (1977). Remaining personal representatives to continue if one disqualified.

DISTRICT OF COLUMBIA

D.C. Code Ann. § 1-744 (1981). Prohibition against certain persons holding certain positions.

VI. STATE ENACTMENTS DISQUALIFYING CONVICTED FELONS FROM SERVING AS POLICE OFFICERS, PEACE OFFICERS, OR OTHER LAW ENFORCEMENT OFFICERS

ARKANSAS

Ark. Code Ann. § 12-8-202 (Michie 1987). Qualifications of members.

Ark. Code Ann. § 12-9-106 (Michie 1987). Selection and training requirements—Exceptions.

CALIFORNIA

Cal. Gov't Code § 1029 (Deering 1980 & Supp. 1993). Disqualifications for office or employment as peace officer.

COLORADO

Col. Rev. Stat. § 24-31-305 (West Supp. 1993). Certification—revocation of certification.

GEORGIA

Ga. Code Ann. § 15-16-1 (1990 & Supp. 1993). Qualifications; training requirements.

Ga. Code Ann. § 35-8-7.1 (1990 & Supp. 1993). Authority of council to refuse certificate to applicant or to discipline certified peace officer or exempt peace officer; grounds; restoration of certificate.

KANSAS

Kan. Stat. Ann. § 74-5616 (1992). Eligibility for appointment as officer; certification by commission required; suspension, revocation or denial of certification; judicial review.

MASSACHUSETTS

Mass. Ann. Laws ch. 41, § 96A (Law. Co-op. 1993). No Felon to Be Appointed.

Mass. Ann. Laws ch. 125, § 9 (Law. Co-op. 1989). Training School for Correction Officers.

OKLAHOMA

Okla. Stat. tit. § 3311 (West Supp. 1994). Council on Law Enforcement Education and Training.

OREGON

Or. Rev. Stat. § 206.015 (1989). Qualifications of sheriff; determination of qualifications by Board on Public Safety Standards and Training.

PENNSYLVANIA

Pa. Stat. Ann. tit. 53, § 744 (Supp. 1993). Powers and duties of the commission.

UTAH

Utah Code Ann. § 53-6-203 (Supp. 1993). Applicants for admission to training programs or for certification examination—Requirements.

WYOMING

Wyo. Stat. § 9-1-704 (1977). Qualifications for employment as a peace officer; loss of certification for felony conviction; termination from employment.

APPENDIX B

INDEX OF STATE CIVIL RIGHTS RESTORATION STATUTES

ALABAMA

Ala. Code § 17-3-10 (1987). Restoration of right to vote upon pardon.

> Any person who is disqualified by reason of conviction of any of the offenses mentioned in article VIII of the Constitution of Alabama, except treason and impeachment, whether the conviction was had in a state or federal court, and who has been pardoned, may be restored to his citizenship with right to vote by the state board of pardons and paroles when specifically expressed in the pardon. If otherwise qualified, such person shall be permitted to register or reregister as an elector upon submission of a copy of the pardon document to the board of registrars or deputy registrars of the county of his residence.

ALASKA

Alaska Stat. § 15.05.030 (1993). Loss and restoration of voting rights.

> (a) A person convicted of a crime that constitutes a felony involving moral turpitude under state law may not vote in a state or a municipal election from the date of the conviction through the date of the unconditional discharge of the person. Upon the unconditional discharge, the person may register under AS 15.07.

ARIZONA

Ariz. Rev. Stat. Ann. § 13-905 (1989). Restoration of civil rights; persons completing probation.

A. A person who has been convicted of two or more felonies whose period of probation has been completed may have any civil rights which were lost or suspended by his felony conviction restored by the judge who discharges him at the end of the term of probation.

B. Upon proper application, a person who has been discharged from probation either prior to or after adoption of this chapter may have any civil rights which were lost or suspended by his felony conviction restored by the superior court judge by whom the person was sentenced or his successors in office from the county in which he was originally convicted. The clerk of such superior court shall have the responsibility for processing the application upon request of the person involved or his attorney. The superior court shall cause a copy of the application to be served upon the county attorney.

Ariz. Rev. Stat. Ann. § 13-906 (1989). Applications by persons discharged from prison.

A. Upon proper application, a person who has been convicted of two or more felonies who has received an absolute discharge from imprisonment may have any civil rights which were lost or suspended by his conviction restored by the superior court judge by whom the person was sentenced or his successors in office from the county in which he was originally sentenced.

B. A person who is subject to the provisions of subsection A may file, no sooner than two years from the date of his absolute discharge, an application for restoration of civil rights that shall be accompanied by a certificate of absolute discharge from the director of the department of corrections. The clerk of the superior court that sentenced the applicant shall have the responsibility for processing applications for restoration of civil rights upon request of the person involved, his attorney or a representative of the state department of corrections. The superior court shall cause a copy of the application to be served upon the county attorney.

Ariz. Rev. Stat. Ann. § 13-909 (1989). Restoration of civil rights; person completing probation for federal offense.

A. A person who has been convicted of two or more felonies whose period of probation has been completed may have any civil rights which were lost or suspended by his felony conviction in a United States district court restored by the presiding judge of the superior court in the county in which he now resides, upon filing of an affidavit of discharge from the judge who discharged him at the end of the term of probation.

B. Upon proper application, a person who has been discharged from probation either prior to or after adoption of this chapter may have any civil rights which were lost or suspended by his felony conviction restored by an application filed with the clerk of the superior court in the county in which he now resides. The clerk of the superior court shall process the application upon request of the person involved or his attorney.

Ariz. Rev. Stat. Ann. § 13-910 (1989). Applications by persons discharged from federal prison.

A. Upon proper application, a person who has been convicted of two or more felonies who has received an absolute discharge from imprisonment in a federal prison may have any civil rights which were lost or suspended by his conviction restored by the presiding judge of the superior court in the county in which he now resides.

B. A person who is subject to the provisions of subsection A may file, no sooner than two years from the date of his absolute discharge, an application for restoration of civil rights that shall be accompanied by a certificate of absolute discharge from the director of the federal bureau of prisons, unless it is shown to be impossible to obtain such certificate. Such application shall be filed with the clerk of the superior court in the county in which the person now resides and such clerk shall be responsible for processing applications for restoration of civil rights upon request of the person involved or his attorney.

CALIFORNIA

Cal. Penal Code § 4853 (Deering 1992). Restoration of rights, privileges, and franchises; Effect of full pardon on authority of licensing boards.

In all cases in which a full pardon has been granted by the Governor of this state or will hereafter be granted by the Governor to a person convicted of an offense to which the pardon applies, it shall operate to restore to the convicted person, all the rights, privileges, and franchises of which he or she has been deprived

in consequence of that conviction or by reason of any matter involved therein; provided, that nothing herein contained shall abridge or impair the power or authority conferred by law on any board or tribunal to revoke or suspend any right, privilege or franchise for any act or omission not involved in the conviction; provided further, that nothing in this article shall affect any of the provisions of the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code) or the power or authority conferred by law on the Board of Medical Examiners therein, or the power or authority conferred by law upon any board that issues a certificate which permits any person or persons to apply his or her or their art or profession on the person of another.

Cal. Penal Code § 4854 (Deering 1992). Restoration of rights to own and possess firearm; Exception.

In the granting of a pardon to a person, the Governor may provide that the person is entitled to exercise the right to own, possess and keep any type of firearms that may lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 12001 and 12021 shall apply, if the person was ever convicted of a felony involving the use of a dangerous weapon.

COLORADO

Colo. Const. Art. VII, § 10. Disfranchisement during imprisonment.

No person while confined in any public prison shall be entitled to vote; but every such person who was a qualified elector prior

to such imprisonment, and who is released therefrom by virtue of a pardon, or by virtue of having served out his full term of imprisonment, shall without further action, be invested with all the rights of citizenship, except as otherwise provided in this constitution.

CONNECTICUT

Conn. Gen. Stat. § 9-46a (West 1989). Restoration of electoral privileges.

(a) A person who has been convicted of a felony shall have his electoral privileges restored upon submission of written or other satisfactory proof to the admitting official before whom he presents his qualifications to be admitted as an elector, that all fines in conjunction with the conviction have been paid and that he has been discharged from confinement, parole or probation, as the case may be.

(b) The registrars of voters of the municipality in which a person is admitted as an elector, pursuant to subsection (a) of this section, within thirty days after the date on which such person is admitted, shall notify the registrars of voters of the municipality wherein such person resided at the time of his conviction that his electoral rights have been so restored to him.

DELAWARE

Del. Code Ann. tit. 11, § 4347(i) (1987). Parole authority and procedure.

(i) The period served on parole or conditional release shall be deemed service of the term of imprisonment, and subject to the provisions contained in § 4352 of this title, relating to a person who is a fugitive from or has fled from justice, the total time served may not exceed the maximum term or sentence. When a person on parole or conditional release has performed the obligations of his release for such time as shall satisfy the Board that his final release is not incompatible with the best interest of society and the welfare of the individual, the Board may make a final order of discharge and issue a certificate of discharge to the person; but no such order of discharge shall be made within 1 year after the date of release except where the sentence expires earlier thereto. Such discharge, and the discharge of a person who has served his term of imprisonment, shall have the effect of restoring all civil rights lost by operation of law upon commitment. Except when discharged herein a person on parole or conditional release shall be on parole until the expiration of the maximum term for which he is sentenced.

FLORIDA

Fla. Stat. Ann. § 940.05 (West 1985). Restoration of civil rights.

Any person who has been convicted of a felony may be entitled to the restoration of all the rights of citizenship enjoyed by him prior to his conviction if he has:

(1) Received a full pardon from the board of pardons;

(2) Served the maximum term of the sentence imposed upon him; or

(3) Been granted his final release by the Parole Comission.

Fla. Stat. Ann. § 944.293 (West 1985). Initiation of restoration of civil rights.

> With respect to those persons convicted of a felony, the following procedure shall apply: Prior to the time an offender is discharged from supervision, an authorized agent of the department shall obtain from the Governor the necessary application and other forms required for the restoration of civil rights. The authorized agent shall assist the offender in completing these forms and shall insure that the application and all necessary material are forwarded to the Governor before the offender is discharged from supervision.

GEORGIA

Ga. Code Ann. § 16-11-131 (Michie 1992). Possession of firearms by convicted felons and first offender probationers.

> (c) This Code section shall not apply to any person who has been pardoned for the felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitutions or laws of the several states or of a foreign nation and, by the terms of the pardon, has expressly been authorized to receive, possess, or transport a firearm.

HAWAII

Haw. Rev. Stat. § 831-5 (1988). Certificate of discharge.

> (a) If the sentence was in this State, the order, certificate, or other instrument of discharge, given to a person sentenced for a felony upon the person's discharge after completion of service of the person's sentence or after service under probation or parole, shall state that the defendant's rights to vote and to hold any future public office, of which the defendant was deprived by this chapter, are thereby restored and that the defendant suffers no other disability by virtue of the defendant's conviction and sentence except as otherwise provided by this chapter. A copy of the order or other instrument of discharge shall be filed with the clerk of the court of conviction.
>
> (b) If the sentence was in another state or in a federal court and the convicted person has similarly been discharged by the appropriate authorities, the director of social services of this State, upon application and proof of the discharge in such form as the director of social services may require, shall issue a certificate stating that such rights have been restored to the convicted person under the laws of this State.
>
> (c) If another state having an act similar to this chapter issues its certificate of discharge to a convicted person stating that the defendant's rights have been restored, the rights of which the defendant was deprived in this State under this chapter are restored to the defendant in this State.

IDAHO

Idaho Code § 18-310(2) (1949 & Supp. 1993). Imprisonment—Effect on civil rights and offices.

> (2) Upon the final discharge of a person convicted of any felony except treason, a person shall be restored the full rights of citizenship.

As used in this subsection, "final discharge" means satisfactory completion of imprisonment, probation and parole as the case may be.

ILLINOIS

730 ILCS 5/5-5-5(d) (Smith-Hurd 1993) (footnote omitted). Loss and restoration of rights.

(d) On completion of sentence of imprisonment or upon discharge from probation, conditional discharge or periodic imprisonment, or at any time thereafter, all license rights and privileges granted under the authority of this State which have been revoked or suspended because of conviction of an offense shall be restored unless the authority having jurisdiction of such license rights finds after investigation and hearing that restoration is not in the public interest. This paragraph (d) shall not apply to the suspension or revocation of a license to operate a motor vehicle under the Illinois Vehicle Code.

IOWA

Iowa Code Ann. § 914.1. (West 1993). Power of governor.

The power of the governor under the constitution to grant a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of the rights of citizenship shall not be impaired.

Iowa Code Ann. § 914.2. (West 1993). Right of application.

A person convicted of a criminal offense has the right to make application to the board of

parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of rights of citizenship at any time following the conviction.

Iowa Code Ann. § 914.3. (West 1993). Recommendations by board of parole.

1. The board of parole shall periodically review all applications by persons convicted of criminal offenses and shall recommend to the governor the reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of the rights of citizenship for persons who have by their conduct given satisfactory evidence that they will become or continue to be law-abiding citizens.

2. The board of parole shall, upon request of the governor, take charge of all correspondence in reference to an application filed with the governor and shall, after careful investigation, provide the governor with the board's advice and recommendation concerning any person for whom the board has not previously issued a recommendation.

3. All recommendations and advice of the board of parole shall be entered in the proper records of the board.

KANSAS

Kan. Stat. Ann. § 22-3722 (1988). Discharge; restoration of civil rights.

The period served on parole or conditional release shall be deemed service of the term of confinement, and, subject to the provisions con-

tained in K.S.A. 1981 Supp. 75-5217 relating to an inmate who is a fugitive from or has fled from justice, the total time served may not exceed the maximum term or sentence.

When an inmate on parole or conditional release has performed the obligations of his release for such time as shall satisfy the authority that his final release is not incompatible with the best interest of society and the welfare of the individual, the authority may make a final order of discharge and issue a certificate of discharge to the inmate but no such order of discharge shall be made in any case within a period of less than one year after the date of release except where the sentence expires earlier thereto. Such discharge, and the discharge of an inmate who has served his term of imprisonment, shall have the effect of restoring all civil rights lost by operation of law upon commitment, and the certification of discharge shall so state. Nothing herein contained shall be held to impair the power of the governor to grant a pardon or commutation of sentence in any case.

LOUISIANA

La. Const. Art. I, § 20 (1992). Right of Humane Treatment.

No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

MINNESOTA

Minn. Stat. Ann. § 609.165 (West 1993). Restoration of civil rights.

Subdivision 1. When a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

Subd. 1a. Certain convicted felons ineligible to possess firearms. The order of discharge must provide that a person who has been convicted of a crime of violence, as defined in section 624.712, subdivision 5, is not entitled to ship, transport, possess, or receive a firearm until ten years have elapsed since the person was restored to civil rights and during that time the person was not convicted of any other crime of violence. Any person who has received such a discharge and who thereafter has received a relief of disability under United States Code, title 18, section 925, shall not be subject to the restrictions of this subdivision.

Subd. 2. The discharge may be:

(1) By order of the court following stay of sentence or stay of execution of sentence; or

(2) Upon expiration of sentence.

Subd. 3. This section does not apply to a forfeiture of and disqualification for public office as provided in section 609.42, subdivision 2.

MISSISSIPPI

Miss. Code Ann. § 47-7-41 (1972). Discharge from probation.

> When a probationer shall be discharged from probation by the court of original jurisdiction, the field supervisor, upon receiving a written request from the probationer, shall forward a written report of the record of the probationer to the Division of Community Services of the department, which shall present a copy of this report to the Governor. The Governor may, in his discretion, at any time thereafter by appropriate executive order restore any civil rights lost by the probationer by virtue of his conviction or plea of guilty in the court of original jurisdiction.

MONTANA

Mont. Code Ann. § 46-18-801(3) (1993). Effect of conviction—civil disabilities.

> (3) When a person has been deprived of any of his civil or constitutional rights by reason of conviction for an offense and his sentence has expired or he has been pardoned, he shall be restored to all civil rights and full citizenship, the same as if such conviction had not occurred.

NEBRASKA

Neb. Rev. Stat. § 29-112.01 (1989). Convicts; sentence other than confinement in Department of Correctional Services adult correctional facility; warrant of discharge; effect.

> Any person heretofore or hereafter sentenced to be punished for any felony, where sentence

> is other than confinement in the Department of Correctional Services adult correctional facility, shall be restored to civil rights upon receipt from the Board of Pardons of a warrant of discharge, which shall be issued by such board upon receiving from the sentencing court a certificate showing satisfaction of the judgment and sentence entered against such person.

NEVADA

Nev. Rev. Stat. § 213.090 (1992). Pardon: Restoration of civil rights.

> 1. When a pardon is granted for any offense committed, the pardon may or may not include restoration of civil rights. If the pardon includes restoration of civil rights, it shall be so stated in the instrument or certificate of pardon; and when granted upon conditions, limitations or restrictions, they shall be fully set forth in the instrument.
>
> 2. In any case where a convicted person has received a pardon without immediate restoration of his civil rights and has not been convicted of any offense greater than a traffic violation within 5 years after such pardon, he may apply to the state board of pardons commissioners for restoration of his civil rights and release from penalties and disabilities resulting from the offense or crime of which he was convicted. If, after investigation, the board determines that the applicant meets the requirements of this subsection, it shall restore him to his civil rights and release him from all penalties and disabilities resulting from the offense or crime of which he was convicted. If the board refuses to grant such restoration and release, the applicant may, after notice to the board, petition the district

court in which the conviction was obtained for an order directing the board to grant such restoration and release.

Nev. Rev. Stat. § 213.155 (1991). Restoration of civil rights to paroled prisoner.

1. The board may restore a paroled prisoner to his civil rights, such restoration to take effect at the expiration of his parole.

2. In any case where a convicted person has completed his parole without immediate restoration of his civil rights and has not been convicted of any offense greater than a traffic violation within 5 years after completion of parole, he may apply to the state board of parole commissioners for restoration of his civil rights and release from penalties and disabilities which resulted from the offense or crime of which he was convicted. If, after investigation, the board determines that the applicant meets the requirements of this subsection, it shall restore him to his civil rights and release him from all penalties and disabilities resulting from the offense or crime of which he was convicted. If the board refuses to grant such restoration and release, the applicant may, after notice to the board, petition the district court in which the conviction was obtained for an order directing the board to grant such restoration and release.

3. The board may make regulations necessary or convenient for the purposes of this section.

Nev. Rev. Stat. § 213.157 (1991). Restoration of civil rights after sentence served.

In any case where a person convicted of a felony in the State of Nevada has served his sentence and been released from prison, and has not been convicted of any offense greater than a traffic violation within 5 years of his release, he may apply to the department of parole and probation requesting restoration of his civil rights and release from all penalties and disabilities which resulted from the offense or crime of which he was convicted. If, after investigation, the department determines that the applicant meets the requirements of this section, it shall petition the district court in which the conviction was obtained for an order granting such restoration and release. If the department refuses to submit such petition, the applicant may, after notice to the department, petition such court directly for the restoration of civil rights and release from all penalties and disabilities which resulted from the offense or crime of which he was convicted.

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. § 607-A:5 (1991). Certificate of Discharge.

I. If the sentence was imposed in this state, the order, certificate, or other instrument of discharge given to a person sentenced for a felony upon his discharge after completion of service of his sentence or after service under probation or parole shall state that the defendant's rights to vote and to hold any future public office, of which he was deprived by this chapter, are thereby restored and that he suffers no other disability by virtue of his conviction and sentence except as otherwise provided by this chapter. A copy of the order or other instrument of discharge shall be filed with the clerk of the court of conviction.

II. If the sentence was imposed in another state or in a federal court and the convicted person has similarly been discharged by the appropriate authorities, the governor of this state, upon application and proof of the discharge in such form as the governor may require, shall issue a certificate stating that the rights enumerated in paragraph I have been restored to the defendant under the laws of this state.

III. If another state having a similar act issues its certificate of discharge of a convicted person stating that the defendant's rights have been restored, the rights of which he was deprived in this state under this chapter are restored to him in this state.

NEW MEXICO

N.M. Stat. Ann. § 31-13-1 (Michie 1993). Effect of criminal conviction upon civil rights; governor may pardon or grant restoration of citizenship.

B. When any convict shall pass the entire period of his sentence within the penitentiary, he shall be entitled to a certificate thereof by the superintendent of the penitentiary; or if such person shall complete the period of his sentence while on parole, he shall be entitled to a certificate thereof by the director of parole (director of the field services division of the corrections department).

C. The disability imposed by this section may only be removed by the governor. Upon presentation to the governor of a certificate evidencing the completion of an individual's sentence, the governor may, in his discretion, grant to such individual a pardon or a certificate restoring such person to full rights of citizenship.

NEW YORK

N.Y. Correct. Law § 701(1) (McKinney 1987). Certificate of relief from disabilities.

1. A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or the offense specified therein. Such certificate may be limited to one or more enumerated forfeitures, disabilities, or bars, or to relieve the eligible offender of all forfeitures, disabilities, and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.

N.Y. Correct. Law § 701(2) (McKinney 1994). Certificate of relief from disabilities.

[Eff. until Oct. 1, 1994, as amended by L.1993, c. 533. See, also, subd. 2 below.] Notwithstanding any other provision of law, except subdivision five of section twenty-eight hundred six of the public health law or paragraph (b) of subdivision two of section eleven hundred ninety-three of the vehicle and traffic law, a conviction of a crime or of an offense specified in a certificate of relief from disabilities shall not cause automatic forfeiture of any license, permit, employment or franchise, including the right to register for or vote at an election, or automatic forfeiture of any other right or privilege, held by the eligible offender and covered by the certificate. Nor shall such conviction be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a

disability to exercise any right or a disability to apply for or to receive any license, permit or other authority or privilege, covered by the certificate; provided, however a conviction for a second or subsequent violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law committed within the preceding ten years shall impose a disability to apply for or receive an operator's license during the period provided in such law. A certificate of relief from a disability imposed pursuant to subparagraph (v) of paragraph b of subdivision two and paragraphs i and j of subdivision six of section five hundred ten of the vehicle and traffic law may only be issued upon a determination that compelling circumstances warrant such relief.

[Eff. Oct. 1, 1994. See, also, subd. 2 above.] Notwithstanding any other provision of law, except subdivision five of section twenty-eight hundred six of the public health law or paragraph (b) of subdivision two of section eleven hundred ninety-three of the vehicle and traffic law, a conviction of a crime or of an offense specified in a certificate of relief from disabilities shall not cause automatic forfeiture of any license, permit, employment or franchise, including the right to register for or vote at an election, or automatic forfeiture of any other right or privilege, held by the eligible offender and covered by the certificate. Nor shall such conviction be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise any right or a disability to apply for or to receive any license, permit or other authority or privilege, covered by the certificate; provided, however, a conviction for a second or subsequent violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law committed within the preceding ten years shall impose a disability to apply for or receive an operator's license during the period provided in such law.

N.Y. Correct. Law § 702(1) & (2) (McKinney 1987). Certificates of relief from disabilities issued by courts.

1. Any court of this state may, in its discretion, issue a certificate of relief from disabilities to an eligible offender for a conviction that occurred in such court, if the court either (a) imposed a revocable sentence or (b) imposed a sentence other than one executed by commitment to an institution under the jurisdiction of a state department of correctional services. Such certificate may be issued (i) at the time sentence is pronounced, in which case it may grant relief from forfeitures as well as from disabilities, or (ii) at any time thereafter, in which case it shall apply only to disabilities.

2. Such certificate shall not be issued by the court unless the court is satisfied that:

(a) The person to whom it is to be granted is an eligible offender, as defined in section seven hundred;

(b) The relief to be granted by the certificate is consistent with the rehabilitation of the eligible offender; and

(c) The relief to be granted by the certificate is consistent with the public interest.

N.Y. Correct. Law § 703(1) (McKinney 1987). Certificates of relief from disabilities issued by the board of parole.

The state board of parole shall have the power to issue a certificate of relief from disabilities to:

(a) any eligible offender who has been committed to an institution under the jurisdiction of the state department of correctional services. Such certificate may be issued by the board at the time the offender is released from such institution under the board's supervision or otherwise or at any time thereafter;

(b) any eligible offender who resides within this state and whose judgment of conviction was rendered by a court in any other jurisdiction.

NORTH CAROLINA

N.C. Gen. Stat. § 13-1 (1992). Restoration of citizenship.

Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.

(2) The unconditional pardon of the offender.

(3) The satisfaction by the offender of all conditions of a conditional pardon.

(4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

(5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C. Gen. Stat. § 13-2 (1992). Issuance and filing of certificate or order of restoration.

(a) The agency, department, or court having jurisdiction over the inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of G.S. 13-1(1) shall immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

The original of such certificate or order shall be promptly transmitted to the clerk of the General Court of Justice in the county where the official record of the case from which the conviction arose is filed. The clerk shall then file the certificate or order without charge with the official record of the case.

(b) In the case of a person convicted of a crime against another state or the United States, whose rights to citizenship have been restored according to G.S. 13-1, the following provisions shall apply:

(1) It shall be the duty of the clerk of the court in the county where such person resides, upon a showing by such person or his representative that the conditions of G.S. 13-1 have been met, to issue the certificate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

For purposes of this subsection, the fulfillment of the conditions of G.S. 13-1 shall be considered met upon the presentation to the clerk of any paper writing from the agency of any other state or of the United States which had jurisdiction over such person, which shows that the conditions of G.S. 13-1 have been met.

(2) The certificate described in subdivision (b)(1) shall be filed by the clerk of the General Court of Justice in the county in which such person resides.

The provisions of this subsection apply equally to conditional and unconditional pardons by the governor of any other state or by the President of the United States, as well as unconditional discharges by the agency of another state or of the United States having jurisdiction over said person.

NORTH DAKOTA

N.D. Cent. Code § 12-55-24 (1985). Board may restore civil rights.

The board of pardons may restore to civil rights any person convicted of any offense committed against the state, upon cause being shown, after the execution or expiration of sentence or at any other time.

OHIO

Ohio Rev. Code Ann. § 2961.01 (Anderson 1993). Civil rights of convicted felons.

A person convicted of a felony under the laws of this or any other state or the United States, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust, or profit. When any such person is granted probation, parole, or a conditional pardon, he is competent to be an elector during the period of probation or parole or until the conditions of his pardon have been performed or have transpired, and thereafter following his final discharge. The full pardon of a convict restores the rights and privileges so forfeited under this section, but a pardon shall not release a convict from the costs of his conviction in this state, unless so specified.

OREGON

Or. Rev. Stat. § 137.281(5) (1991). Withdrawal of rights during term of imprisonment; restoration of rights.

The rights and privileges withdrawn by this section are restored automatically upon discharge or parole from imprisonment, but in the case of parole shall be automatically withdrawn upon a subsequent imprisonment for violation of the terms of the parole.

SOUTH CAROLINA

S.C. Code Ann. § 24-21-990 (Law. Co-op 1992). Civil rights restored upon pardon.

A pardon shall fully restore all civil rights lost as a result of a conviction, which shall include the right to:

(1) register to vote; (2) vote; (3) serve on a jury; (4) hold public office, except as provided in Section 16-13-210; (5) testify without having the fact of his conviction introduced for impeachment purposes unless the crime indicates a lack of veracity; (6) not have his testimony excluded in a legal proceeding if convicted of perjury; and (7) be licensed for any occupation requiring a license.

SOUTH DAKOTA

S.D. Codified Laws Ann. § 23A-27-35 (1988). Suspension of civil rights on sentence to penitentiary—Prisoner as witness—Restoration of rights on suspension or termination of sentence.

A sentence of imprisonment in the state penitentiary for any term suspends the right of the person so sentenced to vote, to hold public office, to become a candidate for public office and to serve on a jury, and forfeits all public offices and all private trusts, authority or power during the term of such imprisonment. Any person who is serving a term in any penitentiary shall be a competent witness in any action now pending or hereafter commenced in the courts of this state, and his deposition may be taken in the same manner prescribed by statute or rule relating to taking of depositions. After a suspension of sentence pursuant to § 23A-27-18, upon the termination of the time of the original sentence or the time extended by order of the court, a defendant's rights withheld by this section are restored.

S.D. Codified Laws Ann. § 24-5-2 (1988 & Supp. 1993). Restoration to citizenship on discharge—Certificate issued by warden—Copy to clerk of courts.

Whenever any convict has been discharged under the provisions of § 24-5-1 he shall at the time of his discharge be considered as restored to the full rights of citizenship. At the time of the discharge of any convict under the provisions of this chapter, he shall receive from the warden a certificate and such certificate shall be due notice that he has been restored to the full rights of a citizen. If a convict is on parole at the time he becomes eligible for discharge, the warden shall issue a like certificate, which shall be due notice that such convict has been restored to the full rights of a citizen. Any convict discharged prior to July 1, 1965 shall, as of the time of his discharge, be considered as restored to the full rights of citizenship. The warden is hereby authorized to issue a certificate to such ex-convicts.

The warden shall mail a copy of the certificate to the clerk of court for that county from which the convict was sentenced.

TENNESSEE

Tenn. Code Ann. § 40-29-101 (1990). Jurisdiction—Time of application.

(a) Persons rendered infamous or deprived of the rights of citizenship by the judgment of any state or federal court may have their full rights of citizenship restored by the circuit court.

(b) Those pardoned, if the pardon does restore full rights of citizenship, may petition for restoration immediately after such pardon;

provided, that a court shall not have jurisdiction to alter, delete or render void special conditions of pardon pertaining to the right of suffrage.

(c) Those convicted of an infamous crime may petition for restoration up to the expiration of the maximum sentence imposed for any such infamous crime.

Tenn. Code Ann. § 40-29-105 (1990). Felons convicted of infamous crimes after July 1, 1986.

(a) The provisions and procedures provided for in §§ 40-29-101—40-29-104 shall apply to all persons convicted of an infamous crime prior to July 1, 1986.

(b) For all persons convicted of infamous crimes after July 1, 1986, the following procedures shall apply:

(1) Persons rendered infamous or deprived of the rights of citizenship by the judgment of any state or federal court may have their full rights of citizenship restored upon:

(A) Receiving a pardon, except where such pardon contains special conditions pertaining to the right to suffrage;

(B) Service or expiration of the maximum sentence imposed for any such infamous crime; or

(C) Being granted final release from incarceration or supervision by the board of parole, the department of correction or county correction authority;

(2) Persons rendered infamous after July 1, 1986, by virtue of being convicted of one (1)

of the following crimes shall never be eligible to register and vote in this state: First degree murder, aggravated rape, treason or voter fraud;

(3) Any person eligible for restoration of citizenship pursuant to subdivision (b)(1) may request, and then shall be issued, a certificate of restoration upon a form prescribed by the coordinator of elections, by:

(A) The pardoning authority; or

(B) An agent or officer of the supervising or incarcerating authority;

(4) Any authority issuing a certificate of restoration shall forward a copy of such certificate to the coordinator of elections;

(5) Any person issued a certificate of restoration shall submit, to the registrar of the county in which he is eligible to vote, such certificate and upon verification of the same with the coordinator of elections be issued a voter registration card entitling him to vote; and

(6) A certificate of restoration issued pursuant to subdivision (b)(3) shall be sufficient proof to the registrar that such person fulfills the above requirements; however, before allowing a person convicted of an infamous crime to become a registered voter, it is the duty of the registrar in each county to verify with the coordinator of elections that such person is eligible to register under the provisions of this section.

WASHINGTON

Wash. Rev. Code Ann. § 9.96.010 (West 1988). Restoration of civil rights.

> Whenever the governor shall grant a pardon to a person convicted of an infamous crime, or whenever the maximum term of imprisonment for which any such person was committed is about to expire or has expired, and such person has not otherwise had his civil rights restored, the governor shall have the power, in his discretion, to restore to such person his civil rights in the manner as in this chapter provided.

Wash. Rev. Code Ann. § 9.96.020 (West 1988). Form of certificate.

> Whenever the governor shall determine to restore his civil rights to any person convicted of an infamous crime in any superior court of this state, he shall execute and file in the office of the secretary of state an instrument in writing in substantially the following form:
>
> "To the People of the State of Washington
>
> Greeting:
>
> I, the undersigned Governor of the State of Washington, by virtue of the power vested in my office by the constitution and laws of the State of Washington, do by these presents restore to ———— his civil rights forfeited by him (or her) by reason of his (or her) conviction of the crime of ———— (naming it) in the Superior Court for the County of ————, on to-wit: The —— day of ————, 19—.
>
> Dated the — day of ————, 19—.
>
> (Signed) ————————
> Governor of Washington"

Wash. Rev. Code Ann. § 9.96.505 (West 1988). Final discharge of parolee—Restoration of civil rights —Governor's pardoning power not affected.

> When a prisoner on parole has performed the obligations of his release for such time as shall satisfy the board of prison terms and paroles that his final release is not incompatible with the best interests of society and the welfare of the paroled individual, the board may make a final order of discharge and issue a certificate of discharge to the prisoner. The board retains the jurisdiction to issue a certificate of discharge after the expiration of the prisoner's or parolee's maximum statutory sentence: *Provided,* That no such order of discharge shall be made in any case within a period of less than one year from the date on which the board has conditionally discharged the parolee from active supervision by a probation and parole officer, except where the parolee's maximum statutory sentence expires earlier. Such discharge, regardless of when issued, shall have the effect of restoring all civil rights lost by operation of law upon conviction, and the certification of discharge shall so state.
>
> The discharge provided for in this section shall be considered as a part of the sentence of the convicted person and shall not in any manner be construed as affecting the powers of the governor to pardon any such person.

Wash. Rev. Code Ann. § 9.92.066 (West 1988). Termination of suspended sentence—Restoration of civil rights.

> Upon termination of any suspended sentence under RCW 9.92.060 or 9.95.210, such person may apply to the court for restoration of his civil rights. Thereupon the court may in its

discretion enter an order directing that such defendant shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.

WISCONSIN

Wis. Stat. Ann. § 304.078 (1993). Civil rights restored to convicted persons satisfying sentence.

Every person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his or her sentence. The certificate of the department or other responsible supervising agency that a convicted person has served his or her sentence or otherwise satisfied the judgment against him or her is evidence of that fact and that the person is restored to his or her civil rights. The department or other agency shall list in the person's certificate rights which have been restored and which have not been restored. Persons who served out their terms of imprisonment or otherwise satisfied their sentences prior to August 14, 1947, are likewise restored to their civil rights from and after September 25, 1959.

WYOMING

Wyo. Stat. § 7-13-105 (1977). Certificate of restoration of rights.

(a) Upon receipt of a written application, the governor may issue a person convicted of a felony under the laws of a state or the United States a certificate which restores the rights lost pursuant to W.S. 6-10-10-106 when:

(i) His term of sentence expires; or

(ii) He satisfactorily completes a probation period.

No. 93-445

In the Supreme Court of the United States

OCTOBER TERM, 1993

LENARD RAY BEECHAM AND KIRBY LEE JONES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a person with a federal felony conviction who has had his civil rights restored under state law is deemed a convicted felon for purposes of 18 U.S.C. 922(g)(1), which makes it a federal offense for a convicted felon to possess a firearm.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Beecham*, Pet. App. 1a-9a, is unpublished, but the decision is noted at 993 F.2d 1539 (Table). The opinion of the district court in that case, J.A. 10-16, is unreported. The opinion of the court of appeals in *United States* v. *Jones*, Pet. App. 10a-22a, is reported at 993 F.2d 1131; the district court's order, J.A. 23-24, and the magistrate's recommendation, Pet. App. 25a-30a, in that case are unreported.

JURISDICTION

The court of appeals entered its judgment in *Jones* on May 24, 1993, and in *Beecham* on June 2, 1993. The court denied a petition for rehearing in *Beecham* on June 29, 1993. Pet.

App. 23a. On August 13, 1993, the Chief Justice extended the time for filing a petition for a writ of certiorari in *Jones* to and including September 21, 1993. Pet. App. 24a. The combined petition in both cases was filed on that date and granted on November 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 922(g) of Title 18 provides in pertinent part as follows:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year,
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. Section 921(a)(20) of Title 18 provides as follows:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT

1. Petitioner Kirby Lee Jones was indicted in the United States District Court for the Northern District of West Virginia on one count of possessing a firearm after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1), and one count of making a false statement in connection with the purchase of a firearm, in violation of 18 U.S.C. 922(a)(6). J.A. 19-21.

a. In connection with the charge under Section 922(g)(1) the indictment alleged that Jones had three prior felony convictions: a 1969 West Virginia state conviction for breaking and entering, a 1978 West Virginia state conviction for forgery, and a 1971 federal conviction from a United States District Court in Ohio for interstate transportation of a stolen automobile. J.A. 19-20.

Jones moved to dismiss the indictment on the ground that he "had [his] civil rights restored" under West Virginia law after his last state conviction, and that under 18 U.S.C. 921(a)(20), none of his prior convictions imposed any continuing federal firearms disability. In support of that contention, he proffered a 1982 West Virginia certificate discharging him from parole and providing that "any or all civil rights heretofore forfeited are restored." J.A. 22.

The government conceded that West Virginia's restoration of Jones's civil rights following his West Virginia convictions

precluded reliance on either of those convictions for purposes of 18 U.S.C. 922(g)(1). See Pet. App. 27a. The government maintained, however, that the state discharge had no effect on the use of Jones's prior federal conviction.

A magistrate judge recommended that the indictment be dismissed. Pet. App. 25a-30a. Relying on the decisions of the Ninth Circuit in *United States* v. *Geyler*, 932 F.2d 1330 (1991), and the Eighth Circuit in *United States* v. *Edwards*, 946 F.2d 1347 (1991), the magistrate concluded that state law defines whether a former felon's civil rights have been restored for purposes of Section 921(a)(20), even where the prior conviction is a federal one. The magistrate found that the federal conviction therefore could not serve as the predicate conviction for the charge against petitioner under Section 922(g)(1). The district court adopted the magistrate's recommendation and dismissed the indictment. J.A. 23-24.

b. The court of appeals reversed, rejecting the holdings in *Geyler* and *Edwards*. Pet. App. 10a-22a. The court observed that the "linchpin" of the *Geyler-Edwards* analysis "is that the second sentence of [Section 921(a)(20)] should be considered apart from the first." *Id.* at 15a. Even on that basis, it found the other courts' "plain language" analysis unpersuasive. *Id.* at 16a-17a. The court reasoned that the language, history, and purpose of Section 921(a)(20) compelled the conclusion that in enacting it "Congress clearly wished to endow each state with the power to determine how convictions *by that state* would be treated." Pet. App. 20a (emphasis added).

Noting that "a preference exists for determining the meaning of federal criminal legislation without reliance on diverse state laws," Pet. App. 20a, the court of appeals concluded that "a far greater degree of specificity would be necessary before [it] would be willing to find a statutory intent to allow the individual states to negate federal convictions." *Ibid.* Because it found the statute unambiguous when construed in

light of its legislative history, the court declined to apply the rule of lenity. *Id.* at 21a-22a.

2. a. In 1979, petitioner Lenard Ray Beecham was convicted in the United States District Court for the Western District of Tennessee of violating 18 U.S.C. 922(h). C.A. App. 37-39. Following completion of his sentence on that conviction, Beecham moved to North Carolina and became a partner in a used car dealership. Pet. App. 3a. Although neither Beecham nor the dealership possessed a federal firearms license, Beecham regularly used its business premises to buy and sell firearms. On one occasion, he bought a shotgun from a licensed firearms dealer, and in completing the required federal form he answered "no" to the question whether he had ever been convicted in any court of a crime punishable by imprisonment for more than one year. *Ibid.*; J.A. 6. In March 1991, law enforcement officers executing search warrants at Beecham's business premises and home discovered a number of firearms. Pet. App. 4a.

b. Beecham was indicted and tried for being a felon in possession of firearms, dealing in firearms without a license, and making a false statement in connection with the purchase of a firearm. At the close of the government's case, he moved for a judgment of acquittal on the felon-in-possession and false statement counts. He argued that, by operation of Tennessee law, his civil rights were restored upon completion of the sentence on his federal conviction and that, under Section 921(a)(20), a felon whose civil rights have been restored does not fall within the class of persons prohibited from possessing firearms under 18 U.S.C. 922(g)(1). The district court deferred ruling on the motion.

After the jury returned judgments of conviction on all counts, Beecham renewed the motion. Relying upon Fourth Circuit precedent involving state convictions, the court first held that, as between North Carolina and Tennessee, "the relevant jurisdiction for purposes of [the Section 921(a)(20)]

inquiry is the state in which the predicate offenses occurred." J.A. 13. On the authority of the Eighth and Ninth Circuits' decisions in *Edwards* and *Geyler*, the court rejected the government's contention that federal law, not any state's law, governed the effect of the prior federal conviction.

Applying Tennessee law, the district court observed that individuals convicted before 1986 are entitled to petition a state court for restoration of their civil rights. J.A. 14. Construing lack of restoration as an element of the offense under 18 U.S.C. 922(g)(1), the court held that the government had failed to prove that Beecham's rights had not been restored under Tennessee law after the completion of his federal sentence. J.A. 15. The court accordingly entered judgments of acquittal on the possession and false statement counts. J.A. 15-16.

c. The government appealed, and the court of appeals reversed. Pet. App. 1a-5a. Based on its decision with respect to petitioner Jones, the court concluded that "Beecham's 1979 conviction in federal court remains unaffected by Tennessee's, North Carolina's, or any other state's, restoration-of-rights scheme for purposes of [the] federal firearms statutes."[1] Pet. App. 5a. The court therefore remanded the case to the district court for resentencing. Pet. App. 9a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our submission in this case is simple: For purposes of the firearms restrictions imposed by the federal Gun Control Act, 18 U.S.C. 921 *et seq.*, a person's continuing status as a convicted felon is determined by the jurisdiction in which he was originally convicted. If the felony on which the federal

[1] The court of appeals also rejected Beecham's claim, on cross-appeal, that the evidence was insufficient to support his convictions for engaging in an unlicensed firearms business. Pet. App. 8a-9a. That issue is not before this Court.

firearms disability is based was a state offense, then the law of the convicting State determines the status of the defendant's conviction for federal purposes. Similarly, if the predicate felony was a federal offense, then it is federal law that determines the status of the defendant's conviction, not the law of some other jurisdiction.

The 1986 amendments to 18 U.S.C. 921(a)(20) at issue in these cases were enacted in light of this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), and similar lower court cases. Those cases had held that state law did not determine whether a State's own criminal adjudications qualified as predicate convictions under the federal law prohibiting previously convicted felons from possessing firearms. To change that rule, Congress amended Section 921(a)(20) so that, for purposes of the federal firearms disability, each State's law would determine the existence and continuing effect of that State's felony convictions. Congress did not, however, take the further step of conceding to the States the right to determine the effect, under federal law, of prior federal convictions.

Petitioners argue that Congress did take that step, and that the plain language of Section 921(a)(20) makes that clear. In fact, however, the statute does not say, plainly or otherwise, that the status of federal convictions is to be determined by state law, any more than it says that the status of one State's convictions is to be determined by the law of a different State.

In the first sentence of the 1986 amendment to Section 921(a)(20), Congress provided that what constitutes a "conviction" is to be determined by the laws of the convicting jurisdiction; in the second sentence, it provided that a conviction that has been set aside or expunged, or for which the defendant has been pardoned or had his civil rights restored,

is not to be considered a "conviction" for purposes of the federal firearms disability. Because the context (and in particular the first sentence) of the 1986 amendment made clear that it was the manner in which the convicting jurisdiction treated its own convictions that governed the status of those convictions for federal law, it was not necessary for the second sentence to specify independently that the orders of expungement, orders setting aside convictions, pardons, or restorations of civil rights to which it referred would be actions by the convicting jurisdiction. Thus, the most natural reading of the statute is that the status of a particular action by a particular jurisdiction—whether the action constitutes a "conviction" in the first place, and whether it subsequently continues to constitute a "conviction" for purposes of the federal firearms laws—is to be decided by the law of that jurisdiction. As applied to federal felonies, that means that the question whether a federal conviction is to be taken into account for purposes of the federal firearms disability is a question of federal law, not a question to be decided under the law of any State.

The interpretation of the statute proposed by petitioners would lead to intractable problems of construction. Petitioners do not suggest which State's law should be consulted to determine whether a federal felony is to be given continuing effect, and there is nothing in the statute that gives any hint of which State's law should control—the State of the defendant's residence, the State of the defendant's prior federal felony conviction, the State where the defendant commits the new firearms offense, or some other State. Since that question would be such an obvious one if state law were intended to control the construction of federal felonies, the fact that the statute provides no answer casts serious doubt on petitioners' construction.

Moreover, although petitioners argue that we are seeking a special rule for federal convictions, just the opposite is true. Under our interpretation of Section 921(a)(20), all jurisdictions are treated alike: each jurisdiction's law determines the effect of that jurisdiction's convictions. Under the approach taken by the Eighth and Ninth Circuits, each State's law determines the effect of that State's convictions, but federal convictions are treated differently. For a federal conviction, state law (or, at least, the law of some State) would determine the status of the conviction for purposes of the federal firearms disability. There is nothing in the text, the background, or the purpose of Section 921(a)(20) that would support such a special (and indeterminate) rule for federal convictions. The statute should therefore be interpreted to apply to federal convictions the same rule that has been uniformly applied to determine the status of state convictions under Section 921(a)(20): in both cases, the status of a conviction for purposes of the federal firearms laws should be determined by the law of the convicting jurisdiction.

ARGUMENT

STATE LAW CANNOT RESTORE A FEDERAL FELON'S RIGHT TO POSSESS FIREARMS UNDER THE FEDERAL GUN CONTROL ACT

A. A Felon's Civil Rights Must Be Restored By The Jurisdiction That Imposed His Conviction In Order For Him To Regain His Right To Possess Firearms Under 18 U.S.C. 921(a)(20)

Section 921(a)(20) was enacted in the wake of this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983). In *Dickerson*, David Kennison, a representative of the respondent corporation, was convicted of a state crime in an Iowa state court. The Iowa court deferred entry of a

formal judgment and placed Kennison on probation. At the end of Kennison's probation term, his record with regard to the deferred judgment was expunged. Although Kennison's state criminal record had been expunged, this Court held that he was still deemed to have a prior felony conviction for purposes of the federal Gun Control Act. The Court observed that under the terms of the federal statute, a conviction that was subsequently expunged was still a conviction, even if the State in which the proceedings were held regarded the defendant as not having been convicted at all.

Partially in response to *Dickerson* and other similar federal court decisions,[2] Congress enacted the Firearms Owners' Protection Act of 1986 (FOPA), Pub. L. No. 99-308, § 101(5), 100 Stat. 449, the statute at issue in this case. The pertinent portion of that Act consists of two sentences added at the end of 18 U.S.C. 921(a)(20). The first sentence provides that what constitutes a conviction "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." The second sentence provides that a conviction that has been expunged or set aside or for which the defendant has been pardoned or had his civil rights restored is not considered a conviction (unless the defendant's right to possess firearms has not been restored). Those two sentences deal with the two aspects of the *Dickerson* Court's construction of the Gun Control Act: (1) the principle that a "conviction" for federal purposes could include a disposition that was not regarded as a "conviction" by the State that imposed it; and (2) the principle that the federal firearms

[2] See, *e.g.*, *Thrall* v. *Wolfe*, 503 F.2d 318 (7th Cir. 1974), cert. denied, 420 U.S. 972 (1975), cited in S. Rep. No. 583, 98th Cong., 2d Sess. 7 n.17 (1984), which held that a state pardon for a state offense (explicitly reconferring the state right to bear firearms) did not alter the status of the state conviction for purposes of 18 U.S.C. 922 (as then in effect).

disability for a state conviction could continue even after the State that imposed the conviction had formally relieved the defendant of all of its other consequences under that State's law.

FOPA altered both of those rules and established two ways for a defendant to avoid liability under the Gun Control Act. The defendant could show that a particular criminal disposition was not considered a "conviction" under the laws of the jurisdiction in which the disposition was entered, or the defendant could show that the conviction had been vacated, expunged, or otherwise deprived of continuing effect by the jurisdiction that issued it.

Petitioners argue that FOPA's amendment to Section 921(a)(20) did much more than that. They contend that the amendment must be read to mean that under the Gun Control Act "[a] person convicted of *any* felony—state or federal—may possess or receive firearms if his rights have been [restored] by *any* law—state or federal." Br. 34. They base that argument on what they deem to be the "plain meaning" of the last sentence of Section 921(a)(20). In their view, because the term "restoration of civil rights" is not qualified by a reference to the jurisdiction where the conviction was obtained, the term must include not only the restoration of civil rights by the convicting jurisdiction, but the restoration of civil rights in one jurisdiction for a conviction obtained in another.

Petitioners' interpretation of the statute cannot possibly be right. If the term "restoration of civil rights" is not understood to refer to a restoration by the convicting jurisdiction, it would mean that if State A restored a defendant's civil rights following his conviction in State B, the State B conviction would no longer qualify as a conviction under federal law. That would be so even if State B regarded its own

conviction as still perfectly valid and still sufficient to bar the defendant from possessing firearms in that State. Carried to its logical end, petitioners' interpretation of Section 921(a)(20) means that the State of Wyoming could render convictions from every other State and from federal courts unusable as "convictions" under the Gun Control Act if Wyoming law restored civil rights to persons convicted in other jurisdictions as soon as they were released from custody.

It is difficult to tell whether petitioners actually mean to advocate that result. Compare, *e.g.*, Br. 24 (restoration "in any manner or by any jurisdiction") with Br. 39-40 (urging remand to determine governing state law). But that is exactly where their "plain meaning" argument drives them. They insist (Br. 12-13) that there is no textual basis for construing the phrase "restoration of civil rights" as limited to the convicting jurisdiction. But if the restoration of civil rights is not limited to the convicting jurisdiction, there is no textual basis for deciding what other jurisdiction's law to consult in determining whether a restoration of civil rights has the effect of removing the federal firearms disability. To suggest that the "restoring" jurisdiction should be the State in which the federal conviction was obtained, or the State in which the defendant was residing when he committed the subsequent federal firearms violation, or the State in which the defendant was charged with the federal firearms violation, requires a complete departure from the text of the statute to which petitioners claim strict allegiance. See Pet. App. 16a-18a.

We submit that neither the extreme position that is the logical consequence of petitioners' argument, nor any of the various contrived stopping places along the way to that extreme position, captures the meaning of Section 921(a)(20) that is found in the language and context of the statute. See, *e.g.*, *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) ("the meaning of statutory language, plain or not, depends

on context"). Instead, a fair reading of the last sentence of Section 921(a)(20), in the context in which it appears, makes clear that the "restoration of civil rights" referred to in the statute is the restoration of civil rights by the jurisdiction in which the conviction was obtained.

The first sentence added to Section 921(a)(20) by FOPA states that the definition of a "conviction" for purposes of the Gun Control Act depends on "the law of the jurisdiction in which the proceedings were held." The second sentence refers to four means by which a conviction can lose its disqualifying effect for purposes of the Gun Control Act: by expungement, by pardon, by being set aside, and by the restoration of civil rights. Although the statute does not explicitly state with respect to any of the four that the convicting jurisdiction must be the one to take the action in question, that is clearly so with respect to the first three, and petitioners do not argue to the contrary. Orders of expungement, orders setting aside a conviction, and pardons all typically are issued by the State that imposed the conviction,[3] and there was no need for Congress to refer to the convicting jurisdiction in order to make its meaning clear. See *United States* v. *Geyler*, 932 F.2d at 1333-1334.

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[3] The sole arguable exception is for federal court orders granting writs of habeas corpus "setting aside" state convictions. And even that is not strictly an exception, since a writ of habeas corpus does not formally "set aside" the state court judgment; it merely directs that the prisoner may not continue to be confined (or suffer similar effects) under that judgment. The Ninth Circuit in *Geyler* recognized the jurisdictional limitation of pardons, expungements, and orders setting aside convictions, but viewed restoration of civil rights as "an entirely different matter," on the theory that "[b]ecause there is no federal procedure for restoring civil rights to a federal felon, Congress could not have expected that the federal government would perform this function." 932 F.2d at 1333. That argument is unpersuasive for the reasons set forth at pages 24-25, *infra*.

The same analysis applies to measures restoring the defendant's civil rights. The reference to the restoration of civil rights is juxtaposed with and clearly intended to parallel the broader but otherwise similar device of a pardon. Both actions are formal steps by which a particular jurisdiction alleviates the collateral consequences of a conviction. Although Section 921(a)(20) does not refer to a "pardon from the convicting jurisdiction," that is plainly what is meant; the federal firearms disability is removed because the jurisdiction that imposed the conviction has chosen to eradicate the effects of that conviction, returning the defendant to his pre-conviction status.

Similarly, although Section 921(a)(20) does not refer to the restoration of civil rights "by the convicting jurisdiction," that is the meaning indicated by both the language and the context. The statute does not refer to "restoration by any jurisdiction," which would indicate a broader meaning for the term, nor is there any other suggestion in the language of the statute that it was meant to render one State's "conviction" no longer cognizable under the Gun Control Act if any other State restored the defendant's civil rights for the first State's conviction. The term "restored" means the return of something that was taken away, and the most natural interpretation of the term in this setting is to refer to an act by one sovereign to return to the defendant the rights that that sovereign took away when it convicted the defendant. Thus, the two sentences that were added to Section 921(a)(20) in 1986 focused on the convicting jurisdiction's treatment of its own convictions, either in their initial classification (covered by the first sentence) or in their later treatment (covered in the second sentence).

The legislative history of FOPA makes that point, although it does not address the precise issue in this case. The Senate Judiciary Committee explained that the design of the statute

was that the law of the convicting jurisdiction would determine the status of the conviction, and thus whether the defendant was subject to the federal firearms disability. The committee report explained: "Since the federal [firearms] prohibition is keyed to the state's conviction, state law should govern in these matters." S. Rep. No. 476, 97th Cong., 2d Sess. 18 (1982). That statement was echoed by Senator Hatch, FOPA's principal sponsor, in presenting to the Senate the bill that was finally enacted: "[The bill] grants authority to the jurisdiction (State) which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony. This will accommodate State reforms enacted since 1968 which permit dismissal of charges after a plea and successful completion of a probationary period. Since the Federal prohibition is triggered by the States' conviction[s], the States' law as to what disqualifies an individual from firearms use should govern." 131 Cong. Rec. 16,984, 16,987 (1985). See also S. Rep. No. 583, 98th Cong., 2d Sess. 2-3 (background), 7 (1984).

In light of *Dickerson* and similar cases, and because the vast majority of criminal convictions are rendered by the States, the law's drafters were of course concerned primarily with the effect of state convictions. But the point made by the legislative history is that the convicting jurisdiction would determine the status of its own convictions for purposes of the federal firearms disability. That point settles the meaning of the term "restores," and therefore resolves cases, such as this one, that involve federal predicate convictions.

In sum, the proper construction of Section 921(a)(20) is that in order for the federal firearms disability to be lifted because of a restoration of civil rights, it is the convicting jurisdiction that must restore the defendant's rights, not some other jurisdiction, which may have much less concern with the first jurisdiction's convictions. Applying that analysis here,

the question whether a federal conviction continues to impose a federal firearms disability depends on the status of that conviction under federal law, not its status under the laws of any State.

B. Petitioners' Construction Of Section 921(a)(20) Does Not Provide A Coherent Rule For Applying The Statute

Although petitioners insist that the court of appeals' construction of Section 921(a)(20) is unfaithful to the "plain meaning" of the statute, they do not propose any competing construction that is dictated by that language. Thus, if the "restoration of civil rights" addressed in the last sentence of Section 921(a)(20) does not refer to the restoration granted by the convicting jurisdiction, it is entirely unclear what jurisdiction's practices would have to be consulted to determine whether the conviction at issue should be regarded as a "conviction" for purposes of the Gun Control Act.

In the case of a federal conviction, if it is not federal law that governs the question of whether the defendant's civil rights have been restored, one is left to guess what law should govern: the law of the State where the offender resides; the law of the State where the defendant committed the alleged firearms violation; the law of some other State that has some connection with the offender or the offense; or, perhaps, if petitioners are to be taken at their word (Br. 24), simply the law of "any jurisdiction." The fact that the statute, as interpreted by petitioners, gives no direction on those obvious and important issues is more than a mere matter of detail to be worked out by the court of appeals on remand, as petitioners appear to suggest (see Br. 39-40). It is a clear indication that Congress did not intend the statute to be interpreted as petitioners propose—because if it had, it surely would have addressed the question of which jurisdiction's restoration laws should apply.

Petitioners' own cases illustrate the confusion and disparate results that flow from a construction of the statute that severs the authority to restore civil rights from the jurisdiction in which the predicate conviction was returned. Petitioner Beecham was convicted of a felony in federal court in Tennessee. Pet. App. 3a. Following his discharge from that conviction, he moved to North Carolina. *Ibid.* The district court took the position that, where a federal predicate conviction for a Section 922(g)(1) violation is involved, the question whether the conviction continues to disqualify the defendant from possessing firearms or whether his civil rights have been restored is governed by the law of the State in which the federal court returning the conviction was located. J.A. 13-14. The court therefore looked to the law of Tennessee to determine whether Beecham's federal disability continued.

Petitioner Jones was convicted of a felony in a federal court in Ohio. Pet. App. 11a-12a. Apparently both before and after his excursion to Ohio, Jones lived in West Virginia, where he received a discharge certificate from the West Virginia Department of Corrections after completing his sentence for the second of two West Virginia convictions. *Id.* at 25a-26a. The district court adopted the view that the West Virginia certificate restored the civil rights that Beecham lost as the result of his federal conviction. *Id.* at 29a; J.A. 23-24.[4]

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[4] It is not at all clear, even as a matter of West Virginia law, that the district court was correct in giving that effect to the West Virginia restoration certificate. That certificate contained no statement to the effect that it was intended to restore any civil rights Jones might have lost as the result of his previous federal conviction. J.A. 22. Moreover, unlike many other States, West Virginia has no statute that expressly addresses the restoration of civil rights following a felony conviction, much less a statutory provision addressing whether such action is intended to extend to federal convictions. See 51 Op. Att'y Gen. W. Va. 182 (1965) (discussing restoration of rights after state felony conviction); cf. 54 Op. Att'y Gen. W. Va. 128 (1972) (discussing whether federal conviction disquali-

That court therefore took the view that it is the State of the defendant's residence at the time of the firearms possession, rather than the State where the federally disqualifying conviction was returned, that is empowered to grant such relief.

Although the two district courts looked to entirely different sources of state law to answer the restoration question—the State of residence in Beecham's case and the State where the prior offense took place in Jones's case—petitioners do not suggest which approach was correct and which was wrong. Nor do they even concede that one must necessarily be wrong.

In short, petitioners offer no assistance to the Court in determining how that basic choice-of-law question should be resolved under their theory, or even how it should be approached. Implicitly conceding the uncertainty resulting from their theory, petitioners suggest that the knotty question of which State's law governs the restoration of civil rights following a federal conviction can be sorted out on remand. Br. 40. But the problem is not so easily swept away. The fact that petitioners' proposed construction of the statute gives no direction whatsoever as to what State's law to consult in determining whether the federal firearms disability is still in effect undermines their claim to have identified Congress's intent.

Even if Section 921(a)(20) were to be construed to apply a particular State's law, such as the law of the State where the defendant resides,[5] that construction would make the fire-

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fied state legislator from office under state constitutional and statutory provisions). The court of appeals noted this issue, but declined to address it in light of its disposition of the case on other grounds. Pet. App. 15a n.5.

[5] That was the position taken by the district court below in *Jones* and by the district court in the *Edwards* case, see *United States* v. *Edwards*, 745 F. Supp. 1477, 1479 (D. Minn. 1990). The courts of appeals in *Geyler* and *Edwards* did not take a position on what State's law should control.

arms disability provision of the Gun Control Act subject to ready manipulation by persons seeking to escape the disability. As the court of appeals acknowledged in *Edwards*, 946 F.2d at 1350, and as petitioners now concede (Br. 35-36), such an individual could take a "civil rights bath" by assuming residency in a State that restores civil rights automatically upon completion of a sentence or upon application, and thereby relieve himself of his firearms disability under Section 922(g).[6] Although the court in *Edwards* regarded that anomaly as the responsibility of Congress, 946 F.2d at 1350 ("it is Congress and the Minnesota legislature, not this court, that have drawn the water"), the court got it backwards. The anomaly is not an unfortunate consequence of action that Congress has clearly taken; instead, the anomaly is one of the signs that Congress did not do what the *Edwards* court thought it had done.

A related problem is the unsettled status of federal convictions that would result under petitioners' regime. There is a wide variety of state civil rights restoration statutes. Some

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[6] Addressing the consequences of a construction of Section 921(a)(20) that permits such results, the court in *Jones* provided the following example:

> [Suppose] [f]or example, A and B are released from federal prison after serving sentences for identical crimes. Each was prosecuted in the same district court in a state that does not restore civil rights to its own felons. A remains in the state in which he was prosecuted. After a while, he goes to visit B, who [is] then living in a state that does restore civil rights. Together they commit an armed robbery in B's new home state and are prosecuted in the federal court there for, among other offenses, violations of § 922(g)(1). Under *Geyler*'s holding, B could not be prosecuted for the firearm offense, whereas A could. A similar result would arguably obtain if B had only temporarily moved to the restoring state (long enough to get his "bath") and then committed the robbery in A's state.

Pet. App. 21a.

States restore civil rights, lost as the result of a conviction, automatically upon the person's discharge from custody.[7] Others require the submission of an application to state authorities at some point after discharge.[8] Still others never fully restore a felon's civil rights.[9] See generally Burton, Travis & Cullen, *Reducing the Legal Consequences of a Felony Conviction: A National Survey of State Statutes*, 12 Int'l J. Comp. & App. Crim. Just. 101, 104-105 (1988). In addition, while some state restoration of civil rights statutes are broad enough to embrace federal as well as state convictions, either automatically or upon application,[10] others are not, or contain no

[7] See, *e.g.*, Minn. Stat. Ann. § 609.165 (West 1987); N.C. Gen. Stat. § 13-1 (1992); Ohio Rev. Code Ann. § 2967.16 (Anderson 1993); Or. Rev. Stat. § 137.281(5) (1991); 51 Op. Att'y Gen. W. Va. 182, 186 (1965).

One threshold question is exactly *which* "civil rights" must be restored in order to invoke Section 921(a)(20). In general, the courts have focused on the rights to vote, hold public office and serve on juries (and treated as a separate issue any continuing firearms disabilities imposed, even after restoration, by the convicting State itself). See, *e.g.*, *United States* v. *Cassidy*, 899 F.2d 543, 545-550 (6th Cir. 1990); *United States* v. *Meeks*, 987 F.2d 575, 578 (9th Cir.), cert. denied, 114 S. Ct. 314 (1993).

[8] See, *e.g.*, Ariz. Rev. Stat. Ann. § 13-906 (1989) (application required of multiple offenders); Fla. Stat. Ann. § 944.293 (West 1985); Iowa Code Ann. § 914.2 (West 1993); Nev. Rev. Stat. § 213.157 (1991); Tenn. Code Ann. §§ 40-29-101, 40-29-102 (1990) (convictions rendered before 1986).

[9] See, *e.g.*, *United States* v. *Driscoll*, 970 F.2d 1472 (6th Cir. 1992) (holding that Michigan law never fully restores the right of a convicted felon to sit on a jury), cert. denied, 113 S. Ct. 1056 (1993); Mo. Rev. Stat. § 561.026 (Vernon 1979) (felons permanently disqualified from jury service unless pardoned); *United States* v. *Thomas*, 991 F.2d 206, 213-214 (5th Cir.) (Texas law), cert. denied, 114 S. Ct. 607 (1993).

[10] See, *e.g.*, Haw. Rev. Stat. § 831-5(b) (1988); La. Const. Art. 1, § 20; N.H. Rev. Stat. Ann. § 607-A:5 (II) (1986); N.C. Gen. Stat. § 13-2(b) (1992); Tenn. Code Ann. §§ 40-29-101(a), 40-29-105(b)(1) (1990); Wyo. Stat. § 7-13-105 (1977 & Supp. 1987).

indication whether they were drafted with federal convictions in mind.[11] In instances such as those presented by the instant cases, where a person has been convicted of a federal felony in one State and thereafter has significant contacts with other jurisdictions, a court operating under petitioners' construction of Section 921(a)(20) would first have to determine which State's statutory scheme would apply, and would then have to determine whether, and under what circumstances, that State would restore a person's civil rights following a federal conviction—often a difficult task.[12] Sorting out the answers would involve federal courts in a long and dismal effort to determine, in every case, the proper law, its content, and its application.[13]

[11] See, *e.g.*, Miss. Code Ann. § 47-7-41 (1993); Nev. Rev. Stat. § 213.157 (1991) (limiting restoration to persons convicted in State); N.D. Cent. Code § 12-55-24 (1985); Ohio Rev. Code Ann. § 2967.16 (Anderson 1993).

[12] For example, the *Geyler* court had no case law or statutory guidance as to whether Arizona's restoration-of-civil-rights statute applied to federal felons; it answered that question in the affirmative based entirely on its own conclusion that to construe the Arizona statute otherwise would be "incongruous." 932 F.2d at 1331 n.1. The *Edwards* court reached the same conclusion with respect to Minnesota law based on a 1971 opinion of the Minnesota Attorney General, nullifying contrary language in the governing Minnesota statute. 946 F.2d at 1349 n.4. As we have noted (see note 4, *supra*), the magistrate in the *Jones* case simply assumed, without reference to any authority, that the state certificate of discharge that restored Jones's civil rights after his second West Virginia felony also restored his civil rights with respect to his federal felony conviction.

[13] The prospects for confusion are nicely illustrated by the unpublished opinion of the Court of Appeals for the Sixth Circuit reprinted by petitioners in the appendix to their petition in these cases. Pet. App. 31a-52a. The court in that case considered the possible application of the laws of Arizona (the seat of the federal court that rendered the defendant's predicate conviction) and Michigan (where the defendant resided), before accepting the government's position that the defendant's rights had

C. Section 921(a)(20) Should Be Construed The Same Way For Federal Convictions As For State Convictions

Petitioners suggest that we are advocating a special rule for federal convictions that is different from the rule applicable to state convictions under Section 921(a)(20). See, *e.g.*, Br. 15. That is not true. Our proposed rule is the same as the rule that has uniformly been applied to determine the status of state convictions under FOPA. In both cases, we submit, the status of a conviction for purposes of the firearms disability must be determined by the law of the convicting jurisdiction.

Where state convictions are involved, the courts of appeals have, without exception, adopted the interpretation of Section 921(a)(20) that we propose here. They have concluded that the relevant law for determining whether a person's civil rights have been restored is that of the convicting jurisdiction. For example, in *United States* v. *Dahms*, 938 F.2d 131 (1991), the Ninth Circuit addressed the question of what jurisdiction controlled the restoration of the defendant's civil rights when the defendant was convicted of a felony in Michigan but subsequently moved to Montana, where he used a shotgun to commit an aggravated assault. Observing that "[t]he first sentence of § 921(a)(20) dictates that the law of the state in which the felon was initially convicted governs the application of § 922(g)," the court reasoned that because "Dahms was originally convicted in Michigan

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not been restored under either law, so that the court was not required to resolve the choice-of-law question. *Id.* at 44a-47a. In the process, the court noted (*id.* at 46a) a conflict between one of its own prior decisions, *United States* v. *Driscoll*, 970 F.2d 1472 (1992), and a decision of the Ninth Circuit, *United States* v. *Dahms*, 938 F.2d 131 (9th Cir. 1991), over the interpretation of Michigan law on the restoration of former felons' civil rights—a further complication made more likely by petitioners' construction.

* * * we must look to the law of that state." *Id.* at 133. Because, in the court's view, Michigan law had effectively restored the defendant's rights upon his release, it concluded that he was no longer "convicted" within the meaning of Section 922(g) at the time of his activities in Montana. 938 F.2d at 133. Accord *United States* v. *Meeks*, 987 F.2d 575, 578 (9th Cir.) (to determine whether defendant's civil rights were restored "we look to the law of * * * the state where the predicate conviction arose"), cert. denied, 114 S. Ct. 314 (1993).

Likewise, in *United States* v. *Cox*, 934 F.2d 1114 (10th Cir. 1991), the defendant was convicted of a felony in a California court and subsequently moved to Colorado, where he was arrested for possession of a pistol. In determining whether the defendant's civil rights had been restored under Section 921(a)(20) following the predicate conviction, the court reasoned that "[w]hether a conviction may serve as a predicate offense for § 922(g)(1) purposes is 'determined in accordance with the law of the jurisdiction' in which the conviction was secured." 934 F.2d at 1122. The court therefore looked to the law of California to determine whether the defendant's conviction continued in effect for purposes of the federal firearms disability. *Ibid.* See also *United States* v. *Essick*, 935 F.2d 28, 30 (4th Cir. 1991) ("in every § 922(g)(1) prosecution, the court must refer to the laws of the jurisdiction in which such purported conviction occurred" and analyze "whether and to what extent the jurisdiction in which the prior conviction occurred 'restores civil rights' "); *United States* v. *Breckenridge*, 899 F.2d 540, 542 (6th Cir.) (New Jersey law governs restoration of civil rights where defendant was convicted of predicate offense there and was subsequently arrested in Kentucky for firearms violation), cert. denied, 498 U.S. 841 (1990).

There is no principled basis for adopting a different approach when it is a federal conviction that disqualifies the

defendant from possessing a firearm. In such cases, as in cases involving state convictions, the courts should look to the law of the "jurisdiction in which the proceedings were held," *i.e.*, federal law, to determine whether the disqualifying conviction has been expunged or set aside, or whether the defendant has been pardoned or has had his civil rights restored.

The courts in *Geyler* and *Edwards* justified deviating from this interpretation of Section 921(a)(20) for federal convictions based in part on the courts' view that, although federal and state law both typically provide for pardons and the setting aside of convictions, federal law does not have a general procedure whereby a defendant can obtain a restoration of civil rights in the absence of full nullification of his conviction. *Geyler*, 932 F.2d at 1334; *Edwards*, 946 F.2d at 1350 & n.5. That observation, however, lends no support to petitioners' construction of the statute.

The fact that Congress enumerated various ways in which convicting jurisdictions might eliminate the continuing effect of felony convictions under the Gun Control Act does not suggest that it intended that each alternative would necessarily be available in each convicting jurisdiction. In fact, in some States there is no procedure for the complete restoration to convicted felons of certain civil rights, especially the right to sit on a jury. See note 9, *supra*. Nonetheless, no court has held that the laws of those States may be disregarded in determining whether civil rights have been restored within the meaning of Section 921(a)(20). Moreover, even if it were true that there were no federal disabilities predicated on prior felony convictions other than the firearms disability (which it is not; see *Geyler*, 932 F.2d at 1334 n.6), it is clear that Congress could impose such disabilities if it chose to do so. And if it did, then of course any civil rights affected could be restored only by federal, not state, action. Section 921(a)(20)'s reference to restorations of civil rights is therefore conceptually no different from its references to other actions always or normally taken only by the jurisdiction that has rendered a prior conviction.

In any event, Congress did provide a method for defendants to seek restoration of the precise "civil right" at issue here—the right to possess a firearm—following a federal conviction. Section 925(c) of Title 18 provides that the Secretary of the Treasury may, upon application, grant relief from the disabilities imposed by federal law with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of a firearm. 18 U.S.C. 925(c). The basis for that relief is a determination by the Secretary that "the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* In cases in which a person has been convicted of a disqualifying offense by a federal court and has not been pardoned or had the conviction set aside, relief under Section 925(c) constitutes the proper avenue for the restoration of federal firearms rights.[14] A federal felon who does not obtain

[14] In the last two fiscal years Congress has prohibited any expenditure of appropriated funds for investigating or acting on applications under Section 925(c) (except, during 1994, applications made by corporations). Treasury Department Appropriations Act, 1994, Pub. L. No. 103-123, Tit. I, 107 Stat. 1228-1229 (1993); Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, Tit. I, 106 Stat. 1732 (1992). See H.R. Rep. No. 618, 102d Cong., 2d Sess. 13-14 (1992) (funds "would be better utilized * * * in fighting violent crime"). Congress's choice not to fund firearms rights restoration procedures during times of fiscal restraint merely underscores the basic point that the federal government is fully capable of providing, withdrawing, or qualifying the opportunity for federal felons to have their firearms rights restored through some procedure short of full nullification of the prior conviction. In this respect, the position and prerogatives of the federal government are no different from those of the States under Section 921(a)(20).

restoration in that manner should be in the same position as a state felon who has not obtained restoration of his civil rights from the convicting State: he should continue to be disabled from possessing a firearm under federal law until his conviction is vacated or he obtains a pardon or expungement.

D. The Rule of Lenity Has No Application In These Cases

Finally, petitioners contend (Pet. Br. 36-38) that the rule of lenity should be applied in these cases. That rule, however, "is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (internal quotation marks and brackets omitted). Accord, *e.g.*, *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991). As we have shown, consideration of the language, purpose, and practical application of Section 921(a)(20) makes it "difficult to imagine any conclusion other than the one" the court of appeals reached in this case. Pet. App. 20a. The rule of lenity therefore has no purchase here.

Indeed, petitioners' argument for lenity is ironic to the extent that it rests on concerns about fair notice. See Br. 36-37. As discussed above, it is petitioners' construction of the statute, which denies the statutory language its natural limiting construction and leaves unresolved the question of what jurisdiction or jurisdictions may relieve a federal felon of his federal firearms disabilities, that would create ambiguity and confusion in the law. The rule of lenity "cannot dictate an implausible interpretation of a statute," *Taylor* v. *United States*, 495 U.S. 575, 596 (1990), and its application should not create more questions than it resolves.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 93-445

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Supreme Court of the United States

OCTOBER TERM, 1993

LENARD RAY BEECHAM

and

KIRBY LEE JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

OTHER AUTHORITIES:

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PETITIONERS' REPLY BRIEF

The Solicitor General's argument on the straightforward question of statutory construction presented by these cases suffers from two serious flaws: *First*, the Solicitor General bases his argument on a misunderstanding and mischaracterization of the concept of "restoration of civil rights." *Second*, much of the Solicitor General's argument is diversionary and irrelevant, invoking anomalies and

uncertainties created by a wholly distinct issue of statutory construction that does not affect the question whether the federal firearms law treats federal predicate convictions differently from state predicate convictions.

I
THE SOLICITOR GENERAL'S PERCEPTION OF "RESTORATION OF CIVIL RIGHTS" IS ERRONEOUS

The Solicitor General begins his argument with a proposition that he describes as "simple" — *i.e.*, that the federal firearms disability imposed upon a convicted felon depends on his "continuing status as a convicted felon." Brief for the United States at 6. The Solicitor General then asserts that, with respect to anyone convicted of a federal offense, "it is federal law that determines the status of the defendant's conviction, not the law of some other jurisdiction." *Id.* at 7.

Whether a convicted felon may legally enjoy civil rights such as the right to vote, to serve as a juror, or to hold public office does not, however, depend on his "continuing status as a convicted felon." Neither the deprivation of those civil rights nor their restoration affects the felon's "status as a convicted felon." Separate state legislation takes away the rights of a convicted felon, and separate legislation restores those rights. By restoring a felon's civil rights, a state law does not extinguish the felony conviction.

In contrast, if a felony conviction is expunged or set aside, its "status" is affected because the conviction has been determined to be invalid or without legal effect. But "status" is not affected by a state law that permits a convicted felon to vote, sit on a jury, or hold public office.

Nor does deprivation and restoration of civil rights occur in the abstract. An individual's right to vote is taken away after he has been convicted of a felony if he seeks to vote where he resides. If that State's law denies the franchise to convicted felons, he will be turned away from the voting booth. He will similarly be stricken from a roster of eligible jurors. If the convicted felon thereafter qualifies for a restoration of rights — either by the occurrence of certain events or by the issuance of a certificate restoring civil rights — he or she will be permitted to vote or to sit on a jury notwithstanding his or her "continuing status as a convicted felon."

Congress determined in 1986, when it passed the Firearm Owners' Protection Act, to allow convicted felons to possess firearms not only if the "status" of their convictions is changed by expungement or reversal, but also if a convicted felon "has had civil rights restored." [1] Congress surely knew that individuals convicted of felonies in either state or federal courts are deprived of civil rights by the laws of most States. And the laws of most States also contain provisions — applicable equally to state and federal felons — that restore the civil rights that have been taken away under specified conditions.

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[1] A pardon lies somewhere between the revision in "status" that results from an expungement or reversal and the change in collateral consequences that results from a restoration of civil rights. Courts have given different effects to pardons. In *United States v. Geyler*, the Ninth Circuit said that a pardon "nullif[ies] the conviction itself." 932 F.2d 1330, 1332 (1991). Other courts have held that a pardon acknowledges and retains the conviction, while restoring most civil rights. See Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 1145 (1970).

The issue in this case is, therefore, whether there is an implied exception to the general restoration-of-civil-rights language of Section 921(a)(20) for federal felony convictions. If a federal felon demonstrates that in the State where his federal conviction occurred or in the State where he resides, his rights to vote, serve on a jury, and hold public office have been restored by state law, is he nonetheless prohibited from possessing a firearm because the "status" of his federal conviction has not been changed by the federal court that entered his felony conviction? The sentence in Section 921(a)(20) that controls these cases does not speak to the "status" of a conviction; its plain language relates only to whether the defendant has "had civil rights restored." And both petitioners in these cases qualified under those terms.

Congress' policy in this regard is entirely rational. By tying the right to possess a firearm under federal law to the restoration of civil rights, Congress has declared that if state law permits a convicted felon to sit on a jury or hold public office notwithstanding his continued "status" as a convicted felon, he or she should also be relieved of the federal disqualification to possess a firearm. That conclusion does not depend on any legal change in the "status" of the felon's conviction. And it surely does not contemplate a state court revising the "status" of a federal felony conviction.

In summary, the Solicitor General errs when he defines the restoration of civil rights as "an act by one sovereign to return to the defendant the rights that the sovereign took away when it convicted the defendant." Brief for the United States at 14. In convicting a defendant, the "sovereign" takes away his liberty and his money because it imprisons him and/or requires him to pay a criminal fine. The conviction itself does not deprive the defendant of civil rights. He is deprived of civil rights by other laws if he attempts to exercise those

rights. If either the State of his residence or the State where he is convicted takes away the rights to vote, serve on a jury, and hold public office by other statutes and then restores those rights, the precondition of Section 921(a)(20) has been satisfied regardless of which jurisdiction initially convicted the defendant.

II
THE "CONFUSION" DESCRIBED BY THE SOLICITOR GENERAL IS IRRELEVANT TO HIS PROPOSED DISTINCTION BETWEEN STATE AND FEDERAL CONVICTIONS

The Solicitor General notes that the restoration-of-civil-rights language of Section 921(a)(20) does not specify whose law governs the question whether rights have been restored. Brief for the United States at 16. He then argues that this uncertainty creates "confusion and disparate results," and that a rule that would carve out federal felony convictions from the restoration-of-civil-rights clause would provide more certainty and predictability. This argument is, however, a diversionary tactic. The confusion and uncertainty which the Solicitor General describes is not the result of the statutory interpretation that we advocate.

The ambiguity in the statute relates to geographic concerns, not to questions of federal or state jurisdiction. Mooted issues arise only because defendants move from one State to another, and the language of Section 921(a)(20) does not specify whether the restoration-of-civil-rights law of the State of conviction or the restoration-of-civil-rights law of the State of residence determine a defendant's status under the federal firearms laws. If a defendant is convicted in federal court and thereafter resides in the State where he was

convicted, the confusion described in the Solicitor General's brief will not exist. Since federal statutes, with a few narrow exceptions, neither take away civil rights nor restore them, the federal-state distinction does not contribute, in the slightest, to the confusion described by the Solicitor General.

The Solicitor General maintains, however, that because confusion would result if a court were to consider the law of any State other than the State of a defendant's conviction, it also follows that restoration of civil rights for a federal conviction must be judged by federal law. The reasoning is patently incorrect. Even if, to obtain greater certainty, Section 921(a)(20) were to be construed to recognize a restoration of civil rights only if granted by the law of the State of conviction, the same certainty could be secured for federal felony convictions by looking only to the law of the State in which the convicting federal court sat. And if the law of the defendant's residence were the standard to determine whether there has been a statutory restoration of rights — an interpretation that hews more closely to the statutory language that speaks of a defendant who "has had civil rights restored" — the very same approach would be taken with federal felons as with state felons. The law of the State where they reside would be examined to see if, pursuant to the law of that State, they may vote, serve as jurors, and hold public office.

The possibility of a "civil rights bath" hypothesized by the Fourth Circuit and by the Solicitor General is greatly exaggerated. The likelihood that a convicted felon will move from a residence in State *A* (which has no restoration-of-civil-rights law) to a temporary location in State *B* just in order to take such a "bath" and then return to State *A* is, we believe, not a significant one. And if such a move is merely a pretext to obtain a "bath" and is not made to change a residence in good faith, the courts may look behind it and refuse to accept

the assertion that the defendant's civil rights were truly restored.

In any event, the undecided choice-of-law issue may be litigated in the future. The existence of the issue does not validate the Fourth Circuit's erroneous conclusion in *Beecham* and *Jones* that a federally convicted felon may not benefit from a restoration of civil rights.

III
RECENT DECISIONS CONTINUE TO REJECT IMPLICIT STATUTORY LIMITATIONS

If the petitioners are to be denied the benefits of Section 921(a)(20) even though they have "had civil rights restored" for their federal felony convictions, it could only be because limiting language is being implied into the statute. Either the word "state" is being inserted between "Any" and "conviction" in the opening two words of the relevant sentence, or the words "by the convicting jurisdiction" are being inserted, by implication, to follow "has had civil rights restored." In our main brief we listed a number of recent decisions of the Court that have rejected arguments that unexpressed limiting provisions should be implied in a statute consisting of plain terms which are unqualified. Since the filing of our main brief, this Court has issued two additional decisions that follow the same course.

(1) In *Fogerty v. Fantasy, Inc.*, No. 92-1750, decided March 1, 1994, the Court held that the plain language of Section 505 of the Copyright Act of 1976 required that a prevailing defendant be treated the same, for purposes of an attorney's fee award, as a prevailing plaintiff. The Court, per the Chief Justice, rejected a "dual standard" that the court of appeals had implied in Section 505.

(2) *National Organization for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994) — The Court unanimously rejected the argument that a violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act required proof of an economic motive and that this qualification should be read into the law. The court, in an opinion by the Chief Justice, observed that Congress could easily have "narrowed the sweep of the term 'enterprise'" if it had wanted to limit the reach of the law. 114 S. Ct. at 805.

CONCLUSION

For the foregoing reasons, as well as those stated in our main brief, the judgments of the court of appeals in the *Beecham* and *Jones* cases should be reversed and the cases remanded for consideration of the remaining issues.

Respectfully submitted,

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